

**OFFICE OF PROCUREMENT AND ASSISTANCE POLICY  
CY 2004 INDEX OF POLICY FLASHES**

<b>POLICY FLASH #</b>	<b>TITLE OF FLASH</b>	<b>DATED</b>	<b>ACTION OFFICER (orig.)</b>
2004 – 01	Electronic Department of Energy Acquisition Regulation (E-DEAR)	01/06/04	R. Langston
2004 – 02	Proposed Rulemaking – Electronic Representations and Certifications	02/11/04	D. Wright
2004-03	Financial Assistance Letter Number 2004-01 – Financial Assistance Letters Remaining in Effect. Financial Assistance Letter Number 2004-02 – Implementation of the Fiscal Year 2004 Legislative Provisions Financial Assistance Letter Number 2004-03 – Intellectual Property	02/16/04	T. Wood J. Kniskern
2004 – 04	Financial Assistance Rule on Grants.gov FIND and Announcement Format	2/12/04	T. Wood
2004-05	Federal Acquisition Circular (FAC) 2001-20 Interim Rule Special Emergency Procurement Authority	2/24/04	D. Wright
2004-06	Contract Management Planning Guidance	2/26/04	J. Tower



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2004-07	FY 2004 Procurement Related Legislative Provisions and Acquisition Letters Remaining in Effect	3/3/04	D. Wright
2004-08	Changes to the DOE Acquisition Guide, Chapter 70, Section 7, "Reference Book for Contract Administrators," Chapter 12, "The Diversity Plan, Equal Employment Opportunity and Small Business"	3/4/04	D. Wright
2004-09	Acquisition Letter 2004-01, Acquisition Letters Remaining in Effect	3/11/04	M. Feschetti
2004-10	Revision to M&O Contractor Model Subcontract entitled "Standard Research Subcontract (Educational Institution or Nonprofit Organization)"	3/24/04	T. Wood
2004-11	DOE Acquisition Guide Updates	3/25/04	M. Fishcetti
2004-12	Federal Acquisition Circular (FAC) 2001-21 Interim Rule With Request for Comments – Federal Prison	4/5/04	D. Wright



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2004-14	Acquisition Letter 2004-03, Small Business Programs	5/5/04	S. Zvolensky
2004-15	Financial Assistance Letter 2004-04, OMB Circular A-133 Audits and the Audit Clearing House	5/11/04	J. Kniskern
2004-16	Office of Federal Procurement Policy (OFFP) Determination of Executive Compensation Benchmark Amount	5/21/04	T. Sheppard
2004-17	Federal Acquisition circulars (FAC) 2001-22 and 2001-23, Final Rules Amending the FAR and an Interim Rule with Request for Comments	5/25/04	D. Wright
2004-18	Implementing the Business Process Change for Inter-Entity	5/28/04	D. Olson
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2004-20	Federal Acquisition Circulars (FAC) 2001-24, Final and Interim Rules Amending the FAR	7/12/04	D. Wright
2004-21	DOE Acquisition Guide Updates	7/13/04	R. Langston
2004-22	Financial Assistance Letter Number 2004-05, Selecting the Appropriate Award Instrument	8/4/04	T. Wood
2004-23	<ol style="list-style-type: none"> <li>1. Proper Use of Other Agencies' Contracts</li> <li>2. Environmentally Preferable Purchasing</li> <li>3. On-line Training Available for Central Contractor Registration (CCR)</li> </ol>	8/10/04	Kniskern/.Lang
2004-24	Department of Energy (DOE) Acquisition Guide Chapter Revisions	9/2/04	R. Lang



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# **HEADQUARTERS POLICY FLASH**

**POLICY FLASH 2004-01**

DATE: January 6, 2004  
TO: Procurement Directors  
FROM: Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

SUBJECT: **Electronic Department of Energy Acquisition Regulation (E-DEAR)**

SUMMARY: The Department of Energy Acquisition Regulation maintained on the Acquisition Home Page is being augmented by a new searchable product.



## **POLICY FLASH 2004-01**

The new product, the E-DEAR, is packaged as a single file in Microsoft Word® format and is formatted to be word processor friendly. It is "searchable" in the "edit/find" sense but lacks any sophisticated search and list capability. The E-DEAR has bookmarks for each Part, and in Part 970, bookmarks exist for each subpart. After opening the file in Word®, you access the bookmarks by selecting "insert," then "bookmark." Select the part or subpart you wish to access from the drop down menu and click the "Go To" icon.

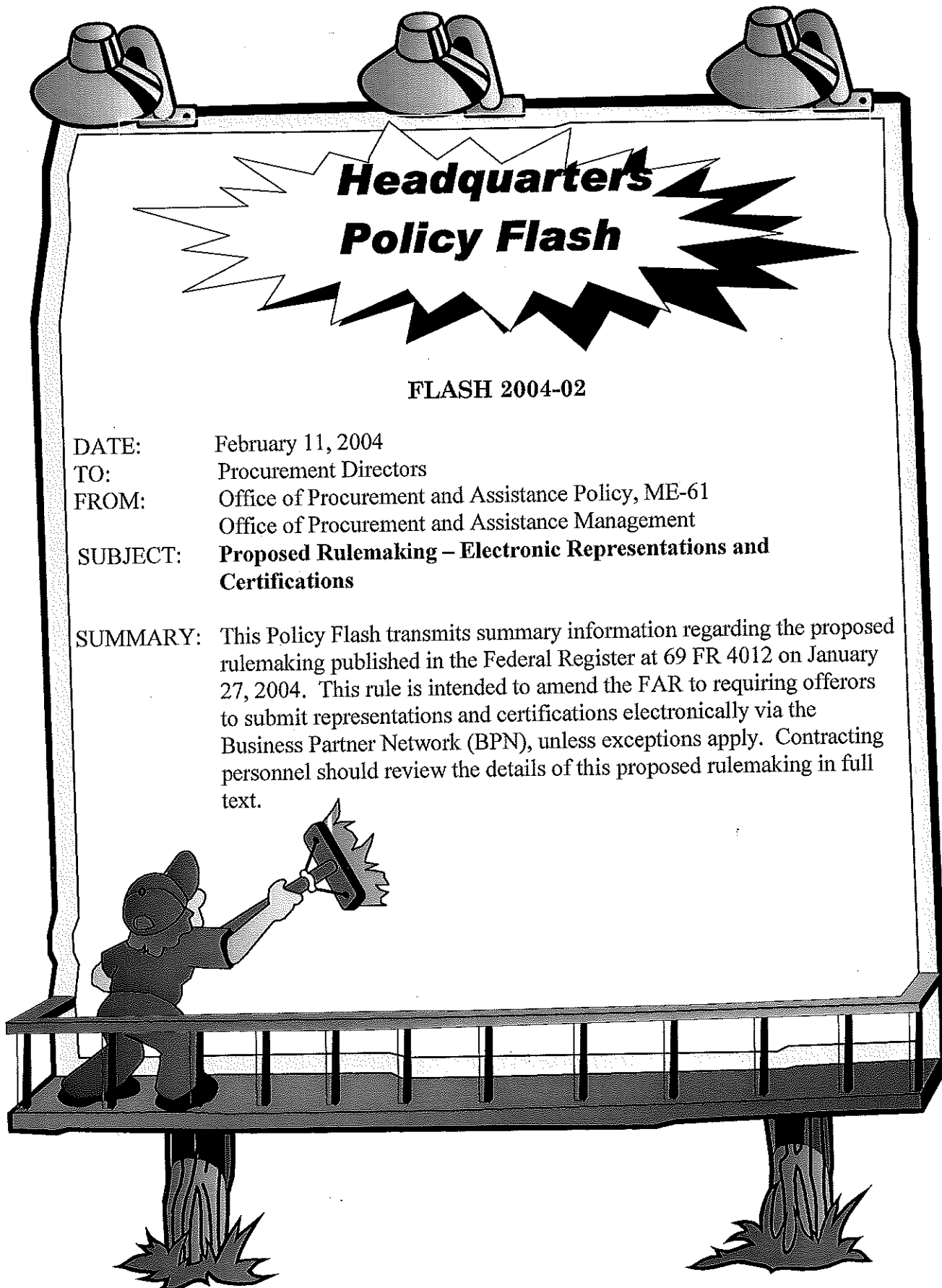
We have retained the current "read by Subpart" capability and added a link to the Hill AFB FarSite. Also a library of final rules which amended the DEAR is also available. These tools may be found at <http://professionals.pr.doe.gov> by selecting "Regulations and Guidance" under the Procurement tab.

For questions related to this Flash, contact Richard Langston at (202) 586-8247 or via e-mail at [Richard.Langston@PR.DOE.GOV](mailto:Richard.Langston@PR.DOE.GOV)



Douglas L. Baptist  
Acting Director  
Office of Procurement and  
Assistance Policy, OMBE





**FLASH 2004-02**  
**February 11, 2004**

As discussed in Policy Flash 2003-05, the BPN, an element under the Integrated Acquisition Environment (IAE) which is part of the e-government initiative, is a grouping of systems that track vendor data. Online Representations and Certifications (ORCA) is another application to the BPN, similar to the Central Contractor Registration (CCR), and the Federal Procurement Data System-Next Generation (FPDS-NG). This electronic application replaces the paper based Representations and Certifications (reps. and certs.) process.

Also, ORCA is designed to eliminate the administrative burden on contractors who are required to provide reps. and certs. information to various contracting offices as many times as an offer is submitted. The usefulness of the Online Representations and Certifications allows Federal government procurement offices to access contractor information which already exists within the CCR database. Therefore, this requirement only applies to offerors required to register in the CCR database.

In addition, this proposed rulemaking seeks to amend FAR Part 12, Acquisition of Commercial Items, Part 14, Sealed Bidding, Part 15, Contracting By Negotiation, and Part 52 Solicitation Provisions and Contract Clauses.

Written comments to the proposed rulemaking are due in this office on or before March 22, 2004. This will allow us time to prepare a consolidated response to the General Services Administration, as necessary. The notice of proposed rulemaking is available via the internet at <http://www.acqnet.gov/far/ProposedRules/2002-024.pdf>

Questions concerning this Flash should be directed to Denise P. Wright on (202) 586-6217 or via e-mail at [Denise.Wright@hq.doe.gov](mailto:Denise.Wright@hq.doe.gov) or David Hoexter on (202) 586-9062 or via e-mail at [David.Hoexter@pr.doe.gov](mailto:David.Hoexter@pr.doe.gov)



Michael P. Fischetti, Acting Director  
Office of Procurement and  
Assistance Policy

cc:  
PPAG Members  
FAAC Members





# Federal Register

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Tuesday,  
January 27, 2004

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## Part III

### **Department of Defense General Services Administration National Aeronautics and Space Administration**

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48 CFR Parts 12, 14, 15, and 52  
Federal Acquisition Regulation; Electronic  
Representations and Certifications;  
Proposed Rule

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 12, 14, 15, and 52**

[FAR Case 2002-024]

RIN 9000-AJ80

**Federal Acquisition Regulation;  
Electronic Representations and  
Certifications**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to require offerors to submit representations and certifications electronically via the Business Partner Network (BPN), unless certain exceptions apply. The BPN is a grouping of systems that follow vendor data. Online Representations and Certifications Application (ORCA) is one application on the BPN to replace the paper based Representations and Certifications (Reps and Certs) process.

**DATES:** Interested parties should submit comments in writing on or before March 29, 2004, to be considered in the formulation of a final rule.

**ADDRESSES:** Submit written comments to—General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to—[farcase.2002-024@gsa.gov](mailto:farcase.2002-024@gsa.gov).

Please submit comments only and cite FAR case 2002-024 in all correspondence related to this case.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501-4082. Please cite FAR case 2002-024.

**SUPPLEMENTARY INFORMATION:****A. Background**

Under current FAR regulations, offerors are required, for each solicitation issued, to complete certain provisions that require representations and certifications. One of the e-Government Integrated Acquisition

Environment's (IAE) initiatives is to eliminate the administrative burden on offerors who must submit the same information to various contracting offices. Representations and certifications that are completed on-line can then be accessed by procurement offices across the Federal government. As part of this process, the software will use certain information that a contractor has already provided in the Central Contractor Registration (CCR) database. Therefore, this requirement only applies to offerors that also are required to register in the CCR database. FAR 16 published in the *Federal Register* at 68 FR 56668, October 1, 2003, mandates FAR Case 2002-018, Central Contractor Registration, as a requirement to contractors doing business with executive agencies. Implementation of the CCR rule should be accomplished by December 2003.

This proposed rule amends FAR parts 12, 14, 15, and 52 to require offerors to—

- (1) Provide representations and certifications electronically via the BPN Web site at [www.bpn.gov](http://www.bpn.gov);
- (2) Update the representations and certifications as necessary, but at least annually to ensure they are kept current, accurate, and complete; and
- (3) Make changes that affect only one solicitation by completing the appropriate section of certain solicitation provisions.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**B. Regulatory Flexibility Act**

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the FAR requires small businesses to provide representations and certifications for individual solicitations. However, FAR 15.209(g) and FAR 14.213 do permit annual submissions if authorized by individual agencies. This rule will establish a requirement for annual submissions by electronic means.

An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. The analysis is summarized as follows:

The FAR requires small businesses to provide representations and certifications for individual solicitations. However, FAR

15.209(g) and FAR 14.213 do permit annual submissions if authorized by individual agencies. This rule will establish a requirement for annual submissions by electronic means.

In an effort to broaden use and reliance upon e-business applications, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are working with the Office of Federal Procurement Policy to eliminate the need to maintain paper-based sources of contractor information. The objective of this rule is to eliminate the need for offerors to submit the same information (*i.e.*, representations and certifications) to different Government contracting offices. By the offerors providing this information to a centralized location, it is anticipated that this rule will have a significant positive impact on small businesses by reducing their overall administrative burden.

The rule will apply to small business offerors that also are required to register in the Central Contractor Registration (CCR) database. The reason for the link with CCR is that, as part of the on-line representations and certifications process, the software will use information that an offeror has already provided into the CCR database. The offeror will provide the additional information needed. Therefore, small businesses that are exempted from registering in the CCR database are also exempted from submitting representations and certifications electronically.

Based on Governmentwide data, approximately, 20,825 small businesses were awarded contracts of \$25,000 or more in fiscal year 2002. It is estimated that a majority of them will be subject to the rule. Many of these businesses are already among the over 240,000 registrants in CCR.

Administrative or financial personnel that have general knowledge of the contractor's business are able to register by providing the pertinent information into the BPN Web site.

The proposed rule when finalized will not duplicate, overlap, or conflict with any other Federal rules.

There are no significant practical alternatives that will accomplish the objective of this rule. Continued reliance on a paper-based system would unnecessarily promote inefficiency associated with paper-based processes. The successful phase-in of CCR by the Department of Defense demonstrates that the Federal contracting community, including small businesses, is successfully transitioning to greater use of electronic tools and their associated efficiencies to conduct business.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR parts 12, 14, 15, and 52 in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2002-024), in correspondence.



**C. Paperwork Reduction Act**

The Paperwork Reduction Act (Pub. L. 104-13) applies because the proposed rule contains information collection requirements. The rule requires offerors to—

(1) Provide representations and certifications electronically via the BPN Web site;

(2) Update the representations and certifications as necessary, but at least annually to ensure they are kept current, accurate, and complete; and

(3) Make changes that affect only one solicitation by completing the appropriate section of certain solicitations.

The requirement to submit certain representations and certifications on line—

(a) Eliminates the administrative burden for the offeror of submitting the same information to various contracting offices; and

(b) Allows access by procurement offices across the Federal Government.

Individual FAR clearances are assigned to the majority of the representations and certifications listed in the rule. Four of the representations and certifications are managed under other agencies' clearances. The FAR clearances impacted by this rule are 9000-0018, 9000-0097, 9000-0094, 9000-0047, 9000-0150, 9000-0155, 9000-0134, 9000-0139, 9000-0024, 9000-0130, 9000-0025, and 9000-0090. The clearance associated with another agency is 1215-0072. It is a DoL clearance.

The above FAR clearances have been revised to reflect a "percentage of responses submitted electronically" of 75%, which in turn decreases the total annual hours associated with each burden. In accordance with (b)(1)(iv) of section 1320.3, Definitions, of 5 CFR 1320.3(b)(1)(iv), the definition of Burden includes "\* \* \* developing, acquiring, installing, and utilizing technology and systems for the purpose of disclosing and providing information \* \* \*". As a result, the subject FAR clearances have been revised to show a total decrease of 35% in burden hours associated with the proposed rule's requirements. The "total annual hours" of the subject FAR clearances have been revised as shown:

OMB clearance	Previous "total annual hours"	Revised "total annual hours"	Previous "% of responses collected electronically"	Actual % of burden reduced (total of 35%)	Revised "% of responses collected electronically"
9000-0018	12850	8352	0	35	75
9000-0097	300000	195000	0	35	75
9000-0094	91667	59584	0	35	75
9000-0047	77810	50577	0	35	75
9000-0150	383007	268102	5	30	75
9000-0155	250	162	0	35	75
9000-0134	32175	20914	0	35	75
9000-0139	83744	58621	5	30	75
9000-0024	9785	6361	0	35	75
9000-0130	952	666	5	30	75
9000-0025	1904	1238	0	35	75
9000-0090	29970	19480	0	35	75

**D. Request for Comments Regarding Paperwork Burden**

Submit comments, including suggestions for reducing this burden, not later than March 29, 2004, to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, Washington, DC 20405. Please cite OMB Control Numbers 9000-0018, 9000-0097, 9000-0094, 9000-0047, 9000-0150, 9000-0155, 9000-0134, 9000-0139, 9000-0024, 9000-0130, 9000-0025, and 9000-0090, Electronic Representations and Certifications.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in

which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the information collection package(s) from the General Services Administration, FAR Secretariat (MVA), Room 4035, Washington, DC 20405, telephone (202) 501-4755. Please cite OMB Control Numbers 9000-0018, 9000-0097, 9000-0094, 9000-0047, 9000-0150, 9000-0155, 9000-0134, 9000-0139, 9000-0024, 9000-0130, 9000-0025, and 9000-0090, Electronic Representations and Certifications, in all correspondence.

**List of Subjects in 48 CFR Parts 12, 14, 15, and 52**

Government procurement.

Dated: January 20, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 12, 14, 15, and 52 as set forth below:

1. The authority citation for 48 CFR parts 12, 14, 15, and 52 are revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 12—ACQUISITION OF COMMERCIAL ITEMS**

2. Amend section 12.301 by adding a sentence after the second sentence in paragraph (b)(1) to read as follows:

**12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

\* \* \* \* \*

(b) \* \* \* Use the provision with its Alternate I in solicitations when an exception to Central Contractor Registration at FAR 4.1102(a) applies.

\* \* \* \* \*

**PART 14—SEALED BIDDING**

3. Amend section 14.201-5 by revising paragraph (a) to read as follows:

**14.201-5 Part IV—Representations and Instructions.**

\* \* \* \* \*

(a) *Section K, Representations, certifications, and other statements of bidders.* (1) Include in this section those solicitation provisions that require representations, certifications, or the submission of other information by bidders.

(2) FAR clause 52.214-30, Annual Representations and Certifications—Sealed Bidding, shall be included in the solicitation to permit electronic submission of certain representations and certification under the circumstances prescribed at 14.201-6(u).

\* \* \* \* \*

4. Amend section 14.201-6 by revising paragraph (u) to read as follows:

**14.201-6 Solicitation provisions.**

\* \* \* \* \*

(u) Insert the provision at 52.214-30, Annual Representations and Certifications—Sealed Bidding, in invitations for bids that contain the clause at 52.204-7, Central Contractor Registration (*see* 14.213).

\* \* \* \* \*

5. Revise section 14.213 to read as follows:

**14.213 Annual submission of representations and certification.**

(a) Offerors shall submit electronic annual representations and certifications via the Business Partner Network (BPN) at <http://www.bpn.gov> in conjunction with registration in the Central Contractor Registration database unless an exception listed at FAR 4.1102(a) applies.

Offerors shall update the representations and certifications as necessary, but at least annually to ensure they are kept current, accurate, and complete. The representations and certifications are effective until one year from date of submission or update.

(b) If FAR clause 52.214-30 is included in the solicitation, do not include the following representations and certifications in the solicitation:

(1) 52.203-2, Certificate of Independent Price Determination.

(2) 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Transactions.

(3) 52.204-3, Taxpayer Identification.

(4) 52.204-5, Women-Owned Business (Other Than Small Business).

(5) 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters.

(6) 52.214-14, Place of Performance Sealed Bidding.

(7) 52.215-6, Place of Performance.

(8) 52.219-1, Small Business Program Representations (Basic & Alternate I).

(9) 52.219-2, Equal Low Bids.

(10) 52.219-19, Small Business Concern Representation for the Small Business Competitiveness Demonstration Program.

(11) 52.219-21, Small Business Size Representation for Targeted Industry Categories Under the Small Business Competitiveness Demonstration Program.

(12) 52.219-22, Small Disadvantaged Business Status (Basic & Alternate I).

(13) 52.222-18, Certification Regarding Knowledge of Child Labor for Listed End Products.

(14) 52.222-22, Previous Contracts and Compliance Reports.

(15) 52.222-25, Affirmative Action Compliance.

(16) 52.222-48, Exemption from Application of Service Contract Act Provisions for Contracts for Maintenance, Calibration, and/or Repair of Certain Information Technology, Scientific and Medical and/or Office and Business Equipment Contractor Certification.

(17) 52.223-4, Recovered Material Certification.

(18) 52.223-9, Estimate of Percentage of Recovered Material Content for EPA-Designated Products (Alternate I only).

(19) 52.223-13, Certification of Toxic Chemical Release Reporting.

(20) 52.225-2, Buy American Act Certificate.

(21) 52.225-4, Buy American Act, North American Free Trade Agreement—Israeli Trade Act Certificate (Basic, Alternate I & II).

(22) 52.225-6, Trade Agreements Certificate.

(23) 52.226-2, Historically Black College or University and Minority Institution Representation.

(24) 52.227-6, Royalty Information (Basic & Alternate I).

(25) 52.227-15—Representation of Limited Rights Data and Restricted Computer Software.

(c) Offerors that have submitted annual representations and certifications shall complete the appropriate section of the provision at 52.214-30, Annual Representations and Certifications Sealed Bidding to—  
(1) Affirm in their bids that the representations and certifications they have posted to the BPN are current for the purposes of the solicitation; or  
(2) Make changes that affect only one solicitation.

**PART 15—CONTRACTING BY NEGOTIATION**

6. Amend section 15.204-5 by revising paragraph (a) to read as follows:

**15.204-5 Part IV—Representations and Instructions.**

\* \* \* \* \*

(a) *Section K, Representations, certifications, and other statements of offerors.* (1) Include in this section those solicitation provisions that require representations, certifications, or the submission of other information by offerors.

(2) FAR clause 52.215-7, Annual Representations and Certifications—Negotiation, shall be included in the solicitation to permit electronic submission of certain representations and certifications via the BPN at <http://www.bpn.gov> in conjunction with registration in the Central Contractor Registration database under the circumstances prescribed at 15.209(g)(1).

\* \* \* \* \*

7. In section 15.209 revise paragraph (g) to read as follows:

**15.209 Solicitation provisions and contract clauses.**

\* \* \* \* \*

(g)(1) Insert the provision at 52.215-7, Annual Representations and Certifications—Negotiation, in solicitations that contain the clause at FAR 52.204-7, Central Contractor Registration (*see* 14.213).

(2) If the provision at 52.215-7 is included in the solicitation, do not include the representations and certifications at 14.213(b) in the solicitation.

\* \* \* \* \*

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

8. Amend section 52.212-1 by revising the date of the provision and paragraph (b)(8); and adding Alternate I to read as follows:

**52.212-1 Instructions to Offerors Commercial Items.**

\* \* \* \* \*

Instructions to Offerors—Commercial Items (Date)

\* \* \* \* \*

(b) *Submission of offers.* \* \* \*

(8) A completed copy of the representations and certifications at FAR 52.212-3 (*see* FAR 52.212-3(j)) for those representations and certifications that the offeror shall complete electronically;

\* \* \* \* \*

(End of provision)

*Alternate I (Date).* As prescribed in 12.301(b)(1), substitute the following paragraph (b)(8) for paragraph (b)(8) of the basic provision:

(8) A completed written copy of the representations and certifications at FAR 52.212-3 excluding paragraph (j).



9. Amend section 52.212-3 by revising the date of the provision; adding an introductory paragraph; and revising paragraph (j) to read as follows:

**52.212-3 Offeror Representations and Certifications.**

*Commercial Items.*

\* \* \* \* \*

**Offeror Representations and Certifications—Commercial Items (Date)**

An offeror shall complete only paragraph (j) of this provision if the offeror has completed the annual representations and certifications electronically via the Business Partner Network (BPN) (but see paragraph (j)(2)). If an offeror has not completed the annual representations and certifications electronically via the BPN, the offeror shall complete only paragraphs (b) through (i) of this provision.

\* \* \* \* \*

(j) *Annual Representations and Certifications* [Do not complete if solicitation includes 52.212-1, Alternate I. Any changes provided by the offeror in (j)(2) of this provision do not automatically change the representations and certifications posted on the BPN]. The offeror has completed the annual representations and certifications electronically via the BPN Web site at <http://www.bpn.gov>. After reviewing the BPN database information, the offeror verifies that the representations and certifications currently posted electronically at FAR 52.212-3, Offeror Representations and Certifications—Commercial Items [check the appropriate block]:

[ ] (1) Are current, accurate, and complete as of the date of this offer and are incorporated in this offer by reference.

[ ] (2) Are current, accurate, and complete as of the date of this offer and are incorporated in this offer by reference, except for paragraphs

[Identify the applicable paragraphs at (b) through (i) of this provision that the offeror

has completed for the purposes of this solicitation only.]

These amended representation(s) and/or certification(s) are also incorporated in this offer and are current, accurate, and complete as of the date of this offer.

(End of provision)

\* \* \* \* \*

10. Revise section 52.214-30 to read as follows:

**52.214-30 Annual Representations and Certification—Sealed Bidding.**

As prescribed in 14.201-6(u), insert the following provision:

**Annual Representations and Certifications—Sealed Bidding (Date)**

The bidder has completed the annual representations and certifications electronically via the Business Partner Network (BPN) Web site at <http://www.bpn.gov>. After reviewing the BPN database information, the bidder verifies that the representations and certifications currently posted electronically [check the appropriate block]:

[ ] (a) Are current, accurate, and complete as of the date of this offer and are incorporated in this bid by reference (see FAR 14.213(b)).

[ ] (b) Are current, accurate and complete as of the date of this bid and are incorporated in this bid by reference, except for the changes identified below [insert changes, identifying change by clause number, title, date].

These amended representation(s) and/or certification(s) are also incorporated in this bid and are current, accurate, and complete as of the date of this bid.

Far clause no.	Title	Date	Change

Any changes provided by the bidder do not automatically update the representations and certifications posted on the BPN.

(End of provision)

11. Revise section 52.215-7 to read as follows:

**52.215-7 Annual Representations and Certifications Negotiation.**

As prescribed in 15.209(g), insert the following provision:

**Annual Representations and Certifications—Negotiation (Date)**

The offeror has completed the annual representations and certifications electronically via the Business Partner Network (BPN) Web site at <http://www.bpn.gov>. After reviewing the BPN database information, the offeror verifies that the representations and certifications currently posted electronically [check the appropriate block]:

[ ] (a) Are current, accurate, and complete as of the date of this offer and are incorporated in this offer by reference (see FAR 14.2113(b)).

[ ] (b) Are current, accurate, and complete as of the date of this proposal and are incorporated in this offer by reference, except for the changes identified below [insert changes, identifying change by clause number, title, date].

These amended representation(s) and/or certification(s) are also incorporated in this offer and are current, accurate, and complete as of the date of this proposal.

Far clause No.	Title	Date	Change

Any changes provided by the offeror do not automatically update the representations and certifications posted on the BPN.

(End of provision)

[FR Doc. 04-1512 Filed 1-26-04; 8:45 am]

BILLING CODE 6820-EP-P



# **HEADQUARTERS POLICY FLASH**

## **POLICY FLASH 2004-03**

DATE: February 12, 2004  
TO: Procurement Directors  
FROM: Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

SUBJECT: Financial Assistance Letter Number 2004-01 – Financial Assistance Letters  
Remaining in Effect.  
Financial Assistance Letter Number 2004-02 – Implementation of the Fiscal Year  
2004 Legislative Provisions  
Financial Assistance Letter Number 2004-03 – Intellectual Property

SUMMARY: This Policy Flash distributes three Financial Assistance Letters.

# **POLICY FLASH**

## **2004-03**

**FAL 2004-01** is a listing of the Financial Assistance Letters Remaining in Effect.

### **FAL 2004-02 – Implementation of Fiscal Year (FY) 2004 Legislative Provisions**

The requirements in this FAL are the same as the requirements in FAL 2003-02 Implementation of Fiscal Year (FY) 2003 Legislative Provisions.

If you have questions regarding this FAL, contact Jacqueline Kniskern at 202 586-8189 or by e-mail at [jacqueline.kniskern@hq.doe.gov](mailto:jacqueline.kniskern@hq.doe.gov).

### **FAL 2004-03 – Intellectual Property**

This FAL provides Contracting Officers, Patent Counsel, and other grants personnel guidance regarding intellectual property (IP) requirements in financial assistance awards and lists the Contracting Officer's responsibilities. The attachment to the FAL is a listing of the DOE standard Intellectual Property (IP) Provisions sets for Financial Assistance Awards. These sets of provisions are maintained on the GC web site at [http://www.gc.doe.gov/techtrans/sipp\\_matrix.html](http://www.gc.doe.gov/techtrans/sipp_matrix.html) and can be accessed from the Professionals Homepage.

Contracting Officers should:

- Use the appropriate set of provisions in awards for research, development or demonstration (RD&D) and consult with Patent Counsel if the applicable standard set of IP provisions is not appropriate or if there are unique mission requirements.
- Consult with Patent Counsel if a non-RD&D award specifies the delivery of technical data.

If you have questions regarding this FAL, contact Trudy Wood at 202 586-5625 or by e-mail at [trudy.wood@hq.doe.gov](mailto:trudy.wood@hq.doe.gov).

Attachments



Michel P. Fischetti  
Acting Director  
Office of Procurement and  
Assistance Policy, OMBE





## FINANCIAL ASSISTANCE LETTER

Financial Assistance Letters (FALs) that remain in effect are identified below. All other previously issued FALs have been superseded by a formal rulemaking, incorporated into other guidance, and/or canceled.

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### Financial Assistance Letters Remaining in Effect

<u>Number</u>	<u>Date</u>	<u>Subject</u>
96-01	03/08/96	Implementation Guidance on Sections 3001 and 3002 of EPAct
96-02	08/01/96	Implementation Guidance on Section 2306 of EPAct
97-05	12/18/97	Merit Review/Lobbying
2001-02	07/30/01	Preservation of Open Competition and Government Neutrality Towards Contractor's Labor Relations on Federally Funded Construction Projects
2001-03	10/12/01	Determining Appropriate Award Instrument
2001-04	10/25/01	Management of Report Deliverables
2003-03R	10/28/03	Implementation of OMB Grant Management Policies
2004-02	02/12/04	Implementation of FY 2004 Legislative Provisions
2004-03	02/12/04	Intellectual Property

### Financial Assistance Letters Discontinued

97-02	03/12/97	Simpson-Craig Amendment Solicitation Provision and Representation (has been incorporated into the DOE-wide Certifications/Assurances/Representations)
2002-03	12/10/02	Implementation of DOE's Industry Interactive Procurement System (IIPS) (cancelled by 2003-03R)



**Department of Energy  
Financial Assistance Regulation**

**No. 2004-03  
Date 02/12/04**

# **FINANCIAL ASSISTANCE LETTER**

Financial Assistance Letter is issued under the authority of the Procurement Executives of DOE and NNSA

## **Subject: Intellectual Property**

### **What is the purpose of this Financial Assistance Letter (FAL)?**

This FAL provides Contracting Officers, Patent Counsel, and other grants personnel guidance regarding intellectual property (IP) requirements in financial assistance awards and lists the Contracting Officer's responsibilities. It supplements the guidance in 10 CFR 600.

### **How will this change my work processes?**

If your office currently has a standard set of IP provisions for each type of recipient and type of financial assistance award, there will be no change in your work processes except that you will use the applicable DOE-wide set of IP provisions. If your office does not have standard IP provisions, this guidance should simplify the award processes because it provides standard IP provisions for grant and cooperative agreement awards. Contracting Officers will continue to negotiate special patent and data provisions if it is necessary to satisfy the unique mission requirements of a particular program.

### **When is this FAL effective?**

This FAL is effective 10 days after the date of issuance.

### **When does this FAL expire?**

This FAL remains in effect until superseded or canceled.

### **Who is the Point of Contact?**

Contact Trudy Wood of the Office of Procurement and Assistance Policy by telephone at (202) 586-5625 or by email at [trudy.wood@hq.doe.gov](mailto:trudy.wood@hq.doe.gov).

## What is the background?

For several years DOE has been actively engaged in the Government-wide effort to streamline and simplify Federal financial assistance programs as required by the Federal Financial Assistance Management Improvement Act of 1999, Public Law 106-107. As part of this process, DOE's Assistant General Counsel for Technology Transfer and Intellectual Property (GC-62) worked with the Office of Procurement and Assistance Policy to clarify and streamline the patent and data requirements for awards to for-profit organizations. The revised IP requirements were tailored specifically for these awards and published in the Federal Register on August 21, 2003 [68 FR 50646]. Some of the revised IP provisions are also applicable to nonprofit organizations (e.g., Patent Rights (Small Business Firms and Nonprofit Organizations)). In order to promote more uniformity in financial assistance patent and data rights requirements, GC-62 and field Patent Counsels have developed sets of IP provisions for the various types of financial assistance awards. These IP provisions are located at [www.gc.doe.gov/gcmain.html](http://www.gc.doe.gov/gcmain.html).

The DOE-wide announcement template (See FAL 2003-03) on DOE's Industry Interactive Procurement System (IIPS) provides a link to the GC web site where the IP provisions are maintained. Thus, awarding offices are no longer required to include the various patent and data rights provisions in announcements of funding opportunities. Applicants are able to access the IP requirements by clicking the link in the announcement.

## Guidance Included in this Financial Assistance Letter

- I. What are the responsibilities of the Contracting Officer?
- II. What are the roles of other DOE/NNSA offices?
- III. Where are the standard IP provisions located?
- IV. Are IP provisions required in non-RD&D awards?
- V. What are the invention reporting requirements?

**Attachment: Standard Intellectual Property (IP) Provisions for Financial Assistance Awards**

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## **I. What are the responsibilities of the Contracting Officer?**

The Contracting Officer must:

- A. Ensure that appropriate patent and data provisions are included in an award.
- B. Consult with Patent Counsel if the applicable standard set of IP provisions is not appropriate or if there are unique mission requirements. If there are unique mission requirements (e.g., open source software), consult with Patent Counsel before the announcement is issued to ensure that appropriate IP requirements are included in the announcement of funding opportunity.
- C. Negotiate, in consultation with Patent Counsel and the DOE/NNSA Project Director, special patent and data clauses if it is necessary to satisfy the mission requirements of a particular program.
- D. Ensure that the Final Invention and Patent Report, if required, is identified on the Federal Assistance Reporting Checklist in the award and is submitted to DOE.

## **II. What are the roles of other DOE/NNSA offices?**

### **A. Patent Counsel:**

- 1. Consults with the Contracting Officer regarding appropriate patent and data clauses and/or modifications to the standard provisions.
- 2. Reviews and approves requests for patent waivers in accordance with 10 CFR part 784.
- 3. Responds to recipient's questions regarding intellectual property issues.
- 4. Receives invention disclosures and interacts with recipients.
- 5. Reviews and approves final summary reports of inventions.

### **B. Project Officer:**

- 1. Identifies mission critical requirements that could affect the patent and data requirements in an award, for example, if software is a deliverable under the award, or if it is necessary to provide heightened assurance of commercialization of a technology by obtaining limited rights to a recipient's background technology.
- 2. Reviews the final technical report and identifies to the Patent Counsel possibly patentable technologies that may have arisen under the award.

### **III. Where are the standard IP provisions located?**

The attached matrix identifies the various sets of IP provisions. The matrix and sets of IP provisions are maintained on the GC web site at [http://www.gc.doe.gov/techtrans/sipp\\_matrix.html](http://www.gc.doe.gov/techtrans/sipp_matrix.html).

Click on the Set Number to access a particular set of provisions. The DOE Professionals Homepage also provides a link to these provisions.

### **IV. Are IP provisions required in non-RD&D awards?**

Patent provisions are normally included only in RD&D awards. Data provisions are included in RD&D awards and in any other award if technical data are expected to be first produced or specified to be delivered under the award. The Contracting Officer should consult with Patent Counsel if a non-RD&D award specifies the delivery of technical data.

### **V. What are the invention reporting requirements?**

If the award includes a patent clause, the Contracting Officer must ensure that the Final Invention and Patent Report block on the Federal Assistance Reporting Checklist (DOE F 4600.2) is checked and that the report is submitted to DOE/NNSA.

**ATTACHMENT****Standard Intellectual Property (IP) Provisions for Financial Assistance Awards**

Type of Award	Type of Project	Special Data Statute (e.g., EPACT)	Type of Recipient	Set Number (PDF)
Cooperative Agreement	Research, Development, or Demonstration (RD&D)	No	Domestic Small Business	<a href="#">CSB-1003</a>
Cooperative Agreement	RD&D	Yes	Domestic Small Business	<a href="#">CDSB-1003</a>
Cooperative Agreement	RD&D	No	Large Business, State or Local Government, and Foreign Entity	<a href="#">CLB-1003</a>
Cooperative Agreement	RD&D	Yes	Large Business, State or Local Government, and Foreign Entity	<a href="#">CDLB-1003</a>
Grant	RD&D	No	Domestic Small Business	<a href="#">GSB-1003</a>
Grant	RD&D	Yes	Domestic Small Business	<a href="#">GDSB-1003</a>
Grant	RD&D	No	Large Business, State or Local Government, and Foreign Entity	<a href="#">GLB-1003</a>
Grant	RD&D	Yes	Large Business, State or Local Government, and Foreign Entity	<a href="#">GDLB-1003</a>
Grant and Cooperative Agreement	RD&D	No	Nonprofit Organization	<a href="#">GNP-1003</a>
Grant and Cooperative Agreement	Non RD&D	N/A	All types of recipients	<a href="#">NRD-1003</a>

Click here to access Allmates I and II to Rights in Data - General (OCT 2003) and Rights in Data-Programs Covered Under Special Data Statutes (OCT 2003).

**NOTE:** The contracting officer, in consultation with DOE Patent Counsel and the DOE Project Director, may negotiate special patent and data clauses, when it is necessary to satisfy the mission requirements of a particular program.

This page was last updated on January 8, 2004



# FINANCIAL ASSISTANCE LETTER

This Financial Assistance Letter is issued under the authority of the Procurement Executives of DOE and NNSA

## **Subject: Implementation of Fiscal Year (FY) 2004 Legislative Provisions**

### **What is the Purpose of this Financial Assistance Letter (FAL)?**

This FAL provides Contracting Officers and grants personnel guidance for the implementation of certain provisions contained in the Energy and Water Development Appropriations Act, 2004 (Energy & Water Act), Pub. L. 108-137, enacted December 1, 2003 and the Department of Interior and Related Agencies Appropriations Act, 2004 (Interior Act), Pub. L. 108-108, enacted November 10, 2003.

### **How will this Change My Work Processes?**

The statutory provisions addressed in this FAL are the same as those enacted for Fiscal Year 2003. There are no changes to any work process.

### **When is this FAL Effective?**

The statutory provisions addressed in this FAL are effective on the date of enactment of the Act containing the provision. This FAL supersedes and cancels FAL 2003-02 "Implementation of Fiscal Year (FY) 2003 Legislative Provisions".

### **When Does This FAL Expire?**

This FAL remains in effect until superseded or canceled.

### **Who is the Point of Contact?**

Contact Jackie Kniskern of the Office of Procurement and Assistance Policy by telephone at (202) 586-8189 or by email at [jacqueline.kniskern@hq.doe.gov](mailto:jacqueline.kniskern@hq.doe.gov).

### **What is the Background?**

The guidance provided in this FAL is the same as the guidance provided in FAL 2003-02 and results from the following statutory requirements:

#### Lobbying Restrictions (Energy and Water Act §501/Interior Act §302)

The Energy and Water Act prohibits the use of funds appropriated, either directly or indirectly, to influence congressional action on any legislation or appropriations matters pending before Congress, other than to communicate to Members of Congress as described in section 1913 of Title 18, United States Code. The Interior Act prohibits the use of funds appropriated under the Act for any activity or the publication of literature that in any way tends to promote public support or opposition to any legislative proposal on which Congressional action is not complete.

Purchase of American-Made Equipment and Products—Sense of Congress (Energy and Water Act §502(a) and (b)) /FY 2000 Interior Act 307(b) and (d). This provision was made permanent in the FY 2000 Interior Act.

This provision provides that it is the sense of Congress that to the greatest extent practicable, all equipment and products purchased with funds made available from the Energy and Water Act should be American-made and requires the Department to notify awardees of this statement.

Compliance with Buy American Act (FY 2000 Interior Act §307(a) and (d)). This provision was made permanent in the FY 2000 Interior Act.

This provision provides that none of the funds made available under the Interior Act may be expended by an entity unless the entity agrees that in expending the funds the entity will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 10a-10c; popularly known as the "Buy American Act").



**What is the Guidance Included in the FAL?**

<b>I.</b>	<b>Lobbying Restrictions.....</b>	<b>4</b>
<b>II.</b>	<b>Purchase of American-Made Equipment and Products - Sense of Congress</b>	<b>5</b>
<b>III.</b>	<b>Compliance with Buy American Act .....</b>	<b>5</b>

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**I. Lobbying Restrictions**

**A. Lobbying Restriction (Energy and Water Act 2004)**

Contracting Officers must incorporate the following clause into existing and new financial assistance awards, when funds made available under the FY 2004 Energy and Water Development Appropriations Act are obligated on the award:

*LOBBYING RESTRICTION (ENERGY AND WATER ACT FY 2004)*

*The awardee agrees that none of the funds obligated on this award shall be expended, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S. C. 1913. This restriction is in addition to those prescribed elsewhere in statute and regulation.*

*(End of Clause)*

**B. Lobbying Restriction (Interior Act, 2004)**

Contracting Officers must incorporate the following clause into existing and new financial assistance awards, when funds made available under the FY 2004 Interior and Related Agencies Appropriation Act are obligated on the award:

*LOBBYING RESTRICTION (INTERIOR ACT FY 2004)*

*The awardee agrees that none of the funds obligated on this award shall be made available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which Congressional action is not complete. This restriction is in addition to those prescribed elsewhere in statute and regulation.*

*(End of Clause)*

## **II. Purchase of American-made Equipment and Products-Sense of Congress**

Contracting Officers must incorporate the following notice into existing or new financial assistance awards, when funds made available under the FY 2004 Energy and Water Development Appropriations Act or any Interior or Related Agencies Appropriation Act after FY 2000:

*NOTICE REGARDING THE PURCHASE OF AMERICAN-  
MADE EQUIPMENT AND PRODUCTS-SENSE OF  
CONGRESS*

*It is the sense of the Congress that, to the greatest extent practicable, all equipment and products purchased with funds made available under this award should be American-made.*

*(End of Notice)*

## **III. Compliance with Buy American Act**

Contracting Officers must incorporate the following clause into existing and new financial assistance awards, when funds made available under any Interior Act, after fiscal year 2000, are obligated on the award:

*COMPLIANCE WITH BUY AMERICAN ACT*

*In accepting this award, the recipient agrees to comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 10a - 10c, popularly known as the "Buy American Act"). The recipient should review the provisions of the Act to ensure that expenditures made under this award are in accordance with it.*

*(End of Clause)*



# **HEADQUARTERS POLICY FLASH**

**POLICY FLASH 2004-04**

DATE: February 24, 2004  
TO: Procurement Directors  
FROM: Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

SUBJECT: Financial Assistance Rule on Grants.gov FIND and Announcement Format

SUMMARY: This Policy Flash distributes a financial assistance rule that was published in the Federal Register on February 20, 2004.

## **POLICY FLASH**

### **2004-04**

This final rule amends the Department's financial assistance regulations as follows:

- DOE must post synopses of program announcements of funding opportunities and modifications to these announcements at the Grants.gov FIND Internet site, using the standard data elements/format. DOE implemented this requirement in Financial Assistance Letter (FAL) 2003-03R, 10/28/03.
- As of the effective date of this rule - March 22, 2004, DOE is no longer required to publish separate notices of funding opportunities in the Federal Register.
- DOE must use the government-wide standard format to publish program announcements of funding opportunities. DOE implemented this requirement in FAL 2003-03R, 10/28/03. (See the financial assistance announcement of funding opportunity template on the Professionals Homepage)

If you have questions regarding this rule, contact Trudy Wood at 202 586-5625 or by e-mail at [trudy.wood@hq.doe.gov](mailto:trudy.wood@hq.doe.gov).

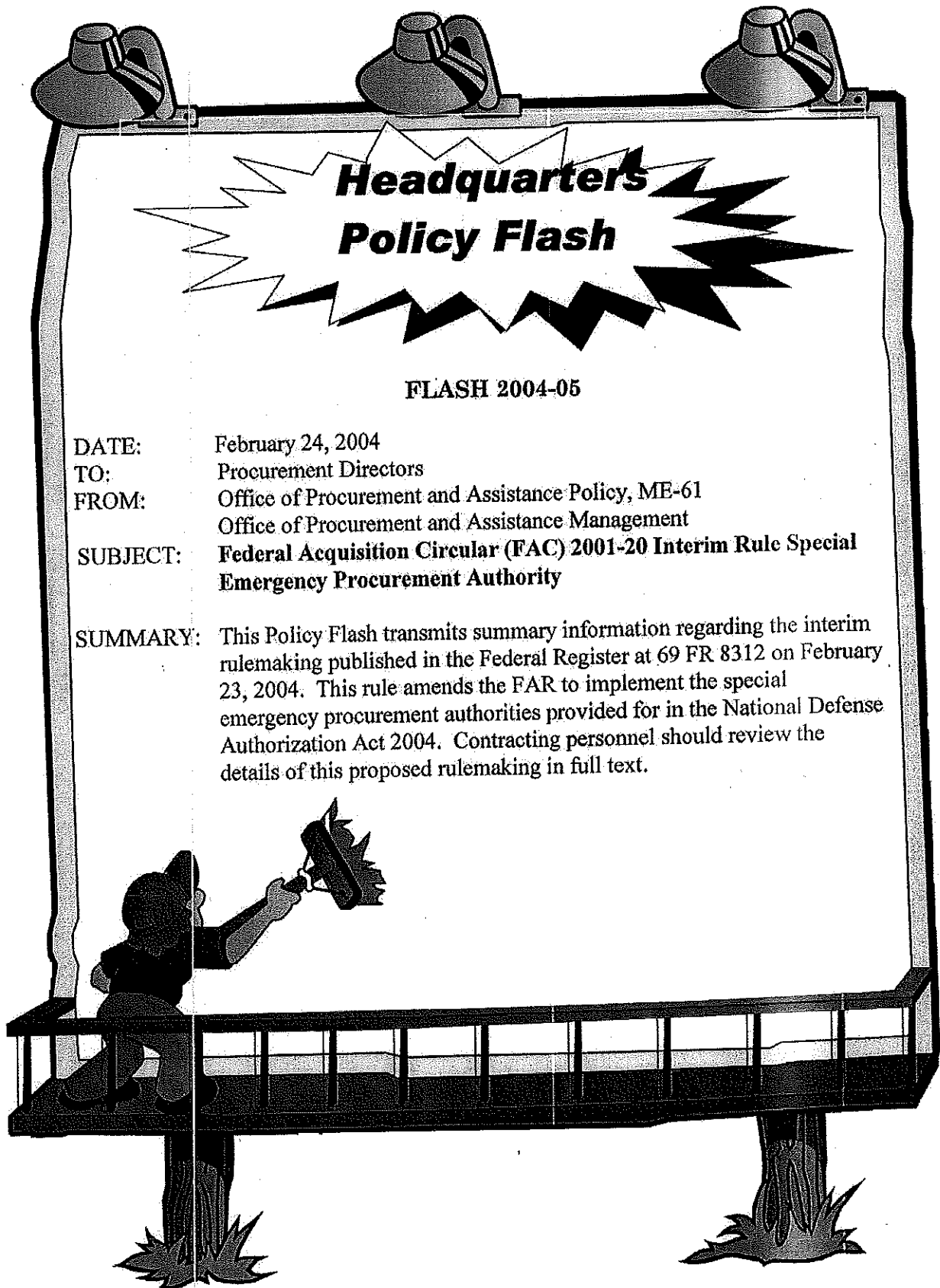
Attachments



Michael P. Fischetti  
Acting Director  
Office of Procurement and  
Assistance Policy, OMBE

cc: FAAC





**DATE:** February 24, 2004  
**TO:** Procurement Directors  
**FROM:** Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management  
**SUBJECT:** **Federal Acquisition Circular (FAC) 2001-20 Interim Rule Special  
Emergency Procurement Authority**

**SUMMARY:** This Policy Flash transmits summary information regarding the interim rulemaking published in the Federal Register at 69 FR 8312 on February 23, 2004. This rule amends the FAR to implement the special emergency procurement authorities provided for in the National Defense Authorization Act 2004. Contracting personnel should review the details of this proposed rulemaking in full text.

**FLASH 2004-05**  
**February 24, 2004**

**Federal Acquisition Circular (FAC) 2001 20**

The following item is available via the internet at  
<http://www.arnet.gov/far/facsframe.html>

*Effective Date: February 24, 2004*

**Special Emergency Procurement Authority (FAR Case 2003-022)**

This interim rule amends FAR parts 2, Definition of Words and Terms, 10, Market Research, 12, Acquisition of Commercial Items, 13, Simplified Acquisition Procedures, 15, Contracting by Negotiation, 19, Small Business Programs, and 25, Foreign Acquisition. The rule-

- Increases the micro-purchase threshold from \$2,500 to \$15,000, except for construction, for acquisitions of supplies or services that the head of the agency has determined to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack;

- Increases simplified acquisition threshold from \$100,000 to-

\$250,000 in U.S.; and  
\$500,000 outside US

for acquisitions of supplies or services that the head of the agency has determined to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack; and

- Provides that the head of the contracting activity carrying out a procurement of supplies or services in the manner described above may treat such supplies or services as a commercial item.

**FLASH 2004-05**  
**February 24, 2004**

Written comments to the proposed rulemaking are due in this office on or before April 5, 2004. This will allow us time to prepare a consolidated response to the General Services Administration, as necessary.

Questions concerning this Flash should be directed to Denise P. Wright on (202) 586-6217 or via e-mail at [Denise.Wright@hq.doc.gov](mailto:Denise.Wright@hq.doc.gov).



Michael P. Fischetti, Acting Director  
Office of Procurement and  
Assistance Policy

cc:  
PPAG Members



# Federal Register

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**Monday,  
February 23, 2004**

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## **Part III**

**Department of  
Defense**

**General Services  
Administration**

**National Aeronautics  
and Space  
Administration**

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**48 CFR Parts 2, 10, et al.**

**Federal Acquisition Regulation; Special  
Emergency Procurement Authority; Small  
Entity Compliance Guide; Interim Rules**

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 2, 10, 12, 13, 15, 19, and  
25****[FAC 2001-20; FAR Case 2003-022]****RIN 9000-AJ88****Federal Acquisition Regulation;  
Special Emergency Procurement  
Authority**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the special emergency procurement authorities of section 1443 of the Services Acquisition Reform Act of 2003 (Title XIV of Pub. L. 108-136). The Councils will publish a final rule upon receipt and evaluation of comments received in response to this interim rule.

Section 1443 increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for an executive agency that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical, or radiological attack. Also, the head of the contracting activity carrying out a procurement of supplies or services to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack may treat such supplies or services as a commercial item.

**DATES:** *Effective Date:* February 23, 2004.

*Comment Date:* Interested parties should submit comments to the FAR Secretariat at the address shown below on or before April 23, 2004 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit written comments to—General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, Attn: Ms. Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to—[farcase.2003-022@gsa.gov](mailto:farcase.2003-022@gsa.gov). Please submit comments only and cite FAC 2001-20, FAR case 2003-022, in all correspondence related to this case. **FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 208-6091. Please cite FAC 2001-20, FAR case 2003-022.

**SUPPLEMENTARY INFORMATION:****A. Background**

This interim rule implements Section 1443 of the Services Acquisition Reform Act of 2003 (Title XIV of Pub. L. 108-136). Section 1443 increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies or services by or for an executive agency that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical, or radiological attack. Section 1443 also authorizes the expanded use of Simplified Acquisition and Commercial Items procedures.

This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**B. Regulatory Flexibility Act**

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* However, the increased thresholds are limited to procurements that support a contingency operation or to facilitate the defense against or the recovery from nuclear, biological, chemical, or radiological attack. There are no data available on the number of procurements that will be eligible. We expect the increased thresholds to this limited class of procurements will apply to a very small number of small entities.

An Initial Regulatory Flexibility Act Analysis has been prepared and is as follows:

**Initial Regulatory Flexibility Act Analysis—  
FAR Case 2003-022**

This Initial Regulatory Flexibility Analysis has been prepared in accordance with Section 603, Title 5, of the United States Code.

1. Description of the reasons why action by the agency is being considered. This interim

rule amends the Federal Acquisition Regulation (FAR) in order to implement Section 1443 of the Services Acquisition Reform Act of 2003 (Title XIV of Pub. L. 108-136). Section 1443 increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies and services to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack.

2. Succinct statement of the objectives of, and legal basis for, the interim rule. This interim rule implements Section 1443 of the Services Acquisition Reform Act of 2003 (Title XIV of Pub. L. 108-136).

3. Description of, and, where feasible, estimate of the number of small entities to which the interim rule will apply. The increased thresholds are limited to procurements that are to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. There are no data available on the number of procurements that will be eligible. However, we expect the number of small entities that will be impacted by the increased thresholds to this limited class of procurements to be very small. In addition, although not required by the statute, the interim rule raises the small business set-aside ceilings for purchases made under the authority of Section 1443 of the Services Acquisition Reform Act of 2003 (Title XIV of Pub. L. 108-136).

4. Description of projected reporting, record keeping, and other compliance requirements of the interim rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record. There are no reporting, record keeping, or other compliance requirements for this interim rule.

5. Identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the interim rule. This rule does not duplicate, overlap, or conflict with other relevant Federal rules.

6. Description of any significant alternatives to the interim rule, which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the interim rule on small entities. There are no significant alternatives to the interim rule that would accomplish the stated objectives yet further reduce impact on small entities. The rule includes only FAR text revisions required to implement the statute.

The FAR Secretariat has submitted a copy of the Initial Regulatory Flexibility Analysis (IRFA) to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR parts 2, 10, 12, 13, 15, 19, and 25 in accordance with 5 U.S.C. 610. Interested parties must submit such



comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001-20, FAR case 2003-022), in correspondence.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the FAR coverage implements Section 1443 of the Services Acquisition Reform Act of 2003, signed on November 24, 2003, which provides urgently needed emergency authorities. However, pursuant to Public Law 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

#### List of Subjects in 48 CFR Parts 2, 10, 12, 13, 15, 19, and 25

Government procurement.

Dated: February 13, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

#### Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2001-20 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001-20 are effective February 23, 2004.

Dated: February 12, 2004.

Deidre A. Lee,

Director, Defense Procurement and Acquisition Policy.

Dated: February 13, 2004.

David A. Drabkin,

Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: February 12, 2004.

Tom Luedtke,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 10, 12, 13, 15, 19, and 25 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 10, 12, 13, 15, 19, and 25 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

#### PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b) by revising the definitions "Micro-purchase threshold" and "Simplified acquisition threshold" to read as follows:

##### 2.101 Definitions.

\* \* \* \* \*

(b) \* \* \*

*Micro-purchase threshold* means

\$2,500, except it means—

(1) \$2,000 for construction subject to the Davis Bacon Act; and

(2) \$15,000 for acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, as described in 13.201(g)(1), except for construction subject to the Davis Bacon Act (Pub. L. 108-136, Title XIV, Sec. 1443).

\* \* \* \* \*

*Simplified acquisition threshold* means \$100,000, except for acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack (Pub. L. 108-136, Title XIV, Sec. 1443), the term means—

(1) \$250,000 for any contract to be awarded and performed, or purchase to be made, inside the United States; and

(2) \$500,000 for any contract to be awarded and performed, or purchase to be made, outside the United States.

\* \* \* \* \*

#### PART 10—MARKET RESEARCH

■ 3. Amend section 10.001 by revising paragraph (a)(2)(v) to read as follows:

##### 10.001 Policy.

(a) \* \* \*

(2) \* \* \*

(v) Agencies shall conduct market research on an ongoing basis, and take advantage to the maximum extent practicable of commercially available market research methods, to identify effectively the capabilities, including the capabilities of small businesses and new entrants into Federal contracting,

that are available in the marketplace for meeting the requirements of the agency in furtherance of a contingency operation or defense against or recovery from nuclear, biological, chemical, or radiological attack; and

\* \* \* \* \*

#### PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 4. Amend section 12.102 by revising paragraph (f) to read as follows:

##### 12.102 Applicability.

\* \* \* \* \*

(f)(1) Contracting officers may treat any acquisition of supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, as an acquisition of commercial items.

(2) A contract in an amount greater than \$15,000,000 that is awarded on a sole source basis for an item or service treated as a commercial item under paragraph (f)(1) of this section but does not meet the definition of a commercial item as defined at FAR 2.101 shall not be exempt from—

(i) Cost accounting standards (*see* Subpart 30.2); or

(ii) Cost or pricing data requirements (*see* 15.403).

■ 5. Amend section 12.203 by revising the last sentence to read as follows:

##### 12.203 Procedures for solicitation, evaluation, and award.

\* \* \* For acquisitions of commercial items exceeding the simplified acquisition threshold but not exceeding \$5,000,000 (\$10,000,000 for acquisitions entered into under the authority of 12.102(f)(1)), including options, contracting activities shall employ the simplified procedures authorized by Subpart 13.5 to the maximum extent practicable.

#### PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 6. Amend section 13.000 by revising the second sentence to read as follows:

##### 13.000 Scope of part.

\* \* \* Subpart 13.5 provides special authority for acquisitions of commercial items exceeding the simplified acquisition threshold but not exceeding \$5,000,000 (\$10,000,000 for acquisitions entered into under the authority of 12.102(f)(1)), including options. \* \* \*

■ 7. Amend section 13.003 by revising paragraphs (b)(1), (c), and (g)(2) to read as follows:

**13.003 Policy.**

(b)(1) Each acquisition of supplies or services that has an anticipated dollar value exceeding \$2,500 (\$15,000 for acquisitions as described in 13.201(g)(1)) and not exceeding \$100,000 (\$250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition at 2.101) is reserved exclusively for small business concerns and shall be set aside (see 19.000 and Subpart 19.5). See 19.502-2 for exceptions.

(c)(1) The contracting officer shall not use simplified acquisition procedures to acquire supplies and services if the anticipated award will exceed—

(i) The simplified acquisition threshold; or

(ii) \$5,000,000 (\$10,000,000 for acquisitions entered into under the authority of 12.102(f)(1)), including options, for acquisitions of commercial items using Subpart 13.5.

(2) Do not break down requirements aggregating more than the simplified acquisition threshold (or for commercial items, the threshold in Subpart 13.5) or the micro-purchase threshold into several purchases that are less than the applicable threshold merely to—

(i) Permit use of simplified acquisition procedures; or

(ii) Avoid any requirement that applies to purchases exceeding the micro-purchase threshold.

(2) \$5,000,000 (\$10,000,000 for acquisitions entered into under the authority of 12.102(f)(1)) for commercial items, use any appropriate combination of the procedures in Parts 12, 13, 14, and 15 (see paragraph (d) of this section).

**13.105 [Amended]**

■ 8. Amend section 13.105 in the first sentence of paragraph (b) by removing "and (f)(2)".

■ 9. Amend section 13.201 by revising paragraph (g) to read as follows:

**13.201 General.**

(g)(1) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, the micro-purchase threshold is \$15,000.

(2) Purchases using this authority must have a clear and direct

relationship to the support of a contingency operation or the defense against or recovery from nuclear, biological, chemical, or radiological attack.

■ 10. Amend section 13.303-5 by revising paragraphs (b)(1) and (b)(2) to read as follows:

**13.303-5 Purchases under BPAs.**

(b) \* \* \*

(1) The simplified acquisition threshold and the \$5,000,000 limitation for individual purchases (\$10,000,000 for purchases entered into under the authority of 12.102(f)(1)) do not apply to BPAs established in accordance with 13.303-2(c)(3).

(2) The limitation for individual purchases for commercial item acquisitions conducted under Subpart 13.5 is \$5,000,000 (\$10,000,000 for purchases entered into under the authority of 12.102(f)(1)).

■ 11. Amend section 13.500 by revising the first sentence of paragraph (a); and removing paragraph (e). The revised text reads as follows:

**13.500 General.**

(a) This subpart authorizes, as a test program, use of simplified procedures for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold but not exceeding \$5,000,000 (\$10,000,000 for acquisitions entered into under the authority of 12.102(f)(1)), including options, if the contracting officer reasonably expects, based on the nature of the supplies or services sought, and on market research, that offers will include only commercial items. \* \* \*

**13.501 [Amended]**

■ 12. Amend section 13.501 by removing from paragraph (a)(1)(ii) "Homeland Security Act (Pub. L. 107-296, section 856)" and adding "Services Acquisition Reform Act of 2003 (Title XIV of Pub. L. 108-136)" in its place.

**PART 15—CONTRACTING BY NEGOTIATION**

■ 13. Amend section 15.403-1 in paragraph (c)(3) by adding the paragraph designation "(i)" before the first sentence, and adding paragraph (c)(3)(ii) to read as follows:

**15.403-1 Prohibition on obtaining cost or pricing data** (10 U.S.C. 2306a and 41 U.S.C. 254b).

(c) \* \* \*

(3) *Commercial items.* (i) \* \* \*

(ii) Any acquisition for noncommercial supplies or services treated as commercial items at 12.102(f)(1), except sole source contracts greater than \$15,000,000, is exempt from the requirements for cost or pricing data (Pub. L. 108-136, Sec. 1443).

**PART 19—SMALL BUSINESS PROGRAMS**

■ 14. Amend section 19.502-1 by revising paragraph (b) to read as follows:

**19.502-1 Requirements for setting aside acquisitions.**

(b) This requirement does not apply to purchases of \$2,500 or less (\$15,000 or less for acquisitions as described in 13.201(g)(1)), or purchases from required sources of supply under Part 8 (e.g., Federal Prison Industries, Committee for Purchase From People Who are Blind or Severely Disabled, and Federal Supply Schedule contracts).

■ 15. Amend section 19.502-2 by revising the first sentence of paragraph (a) to read as follows:

**19.502-2 Total small business set-asides.**

(a) Except for those acquisitions set aside for very small business concerns (see Subpart 19.9), each acquisition of supplies or services that has an anticipated dollar value exceeding \$2,500 (\$15,000 for acquisitions as described in 13.201(g)(1)), but not over \$100,000 (\$250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition at 2.101), is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery.

**19.805-1 [Amended]**

■ 16. Amend section 19.805-1 by—

■ a. Adding "or" to the end of paragraph (b)(1);

■ b. Removing "; or" from the end of paragraph (b)(2) and adding a period in its place; and

■ c. Removing paragraph (b)(3).

■ 17. Amend section 19.903 by adding the word "or" to the end of paragraph (b)(2); revising paragraph (b)(3); and removing paragraph (b)(4). The revised text reads as follows:

**19.903 Applicability.**

\* \* \* \* \*

(b) \* \* \*

(3) Acquisitions of \$15,000 or less for acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack as described in 13.201(g)(1).

**19.1306 [Amended]**

■ 18. Amend section 19.1306 by removing paragraph (c).

**PART 25—FOREIGN ACQUISITION**

■ 19. Amend section 25.1101 by revising the introductory text of paragraph (a)(1) to read as follows:

**25.1101 Acquisition of supplies.**

\* \* \* \* \*

(a)(1) Insert the clause at 52.225-1, Buy American Act—Supplies, in solicitations and contracts with a value exceeding \$2,500 (\$15,000 for acquisitions as described in 13.201(g)(1)) but not exceeding \$25,000; and in solicitations and contracts with a value exceeding \$25,000, if none of the clauses prescribed in paragraphs (b) and (c) of this section apply, except if—

\* \* \* \* \*

■ 20. Amend section 25.1103 by revising paragraph (a) to read as follows:

**25.1103 Other provisions and clauses.**

(a) *Restrictions on certain foreign purchases.* Insert the clause at 52.225-

13, Restrictions on Certain Foreign Purchases, in solicitations and contracts with a value exceeding \$2,500, \$15,000 for acquisitions as described in 13.201(g)(1), unless an exception applies.

\* \* \* \* \*

[FR Doc. 04-3690 Filed 2-20-04; 8:45 am]

BILLING CODE 6820-EP-P

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Chapter 1****Federal Acquisition Regulation; Small  
Entity Compliance Guide**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition

Circular (FAC) 2001-20 which amends the FAR. An asterisk (\*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2001-20 which precedes this document. These documents are also available via the Internet at <http://www.arnet.gov/far>.

**FOR FURTHER INFORMATION CONTACT:**

Laurie Duarte, FAR Secretariat, (202) 501-4225. For clarification of content, contact Mr. Gerald Zaffos at (202) 208-6091.

\* **Special Emergency Procurement Authority (FAR Case 2003-022)**

This interim rule amends the FAR to implement Section 1443 of the Services Acquisition Reform Act of 2003 (Pub. L. 108-136). This rule increases the amount of the micro-purchase threshold and the simplified acquisition threshold for procurements of supplies and services to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. Also, the head of the contracting activity carrying out a procurement of supplies or services to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack may treat such supplies or services as a commercial item.

Dated: February 13, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

[FR Doc. 04-3691 Filed 2-20-04; 8:45 am]

BILLING CODE 6820-EP-P



# **HEADQUARTERS POLICY FLASH**

**POLICY FLASH 2004-06**

DATE: February 26, 2004  
TO: Procurement Directors  
FROM: Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

SUBJECT: **Contract Management Planning Guidance**

SUMMARY: Recently, the Department of Energy (DOE) received a number of broad management challenges from both the General Accounting Office (GAO) and the DOE Office of the Inspector General (IG). Both the GAO and the IG stressed the importance of improving the way the Department conducts the administration and management of its contracts. The Deputy Secretary responded, on March 17, 2003, by directing the Department to aggressively confront and address these challenges.

## POLICY FLASH 2004-06

While recognizing that the Department has made many positive efforts to address and improve DOE's performance, the Deputy Secretary stressed that senior management needed to tackle the underlying causes of the issues raised

In response to the challenges of the GAO and the IG and the Deputy Secretary's direction, an initiative was executed to effect a formal process for contract management planning under the Department's major site and facility contracts and other contracts as appropriate. Acquisition Letter 2003-02 was issued to provide interim coverage while new guidance was developed for the DOE Acquisition Guide to ensure that contract management planning commences at the earliest acquisition planning stage and continues throughout the procurement cycle to ensure the successful accomplishment of the mission of the Department's contracts. The DOE Acquisition Guide has thus been modified as follows:

- a new Chapter 42.5, "Contract Management Planning", has been added to emphasize the importance of developing Contract Management Plans (CMPs) and to identify both the contracts that require CMPs and the information to be contained in them. This guidance was formerly contained in Acquisition Letter 2003-2, "Contract Management Planning;"
- new language has been added to Chapter 71.1, "Headquarters Review of Contract and Financial Assistance Actions", to define the submittal requirements for CMPs as part of the packages submitted for Headquarters Business Clearance approval.

Chapter 7, "Acquisition Planning," will be modified soon with other changes to Chapter 7 that require contract management planning during the acquisition planning stage.

If there are any questions regarding this matter, please contact James Tower at (202) 586-4294 or via email at [james.tower@hq.doe.gov](mailto:james.tower@hq.doe.gov).

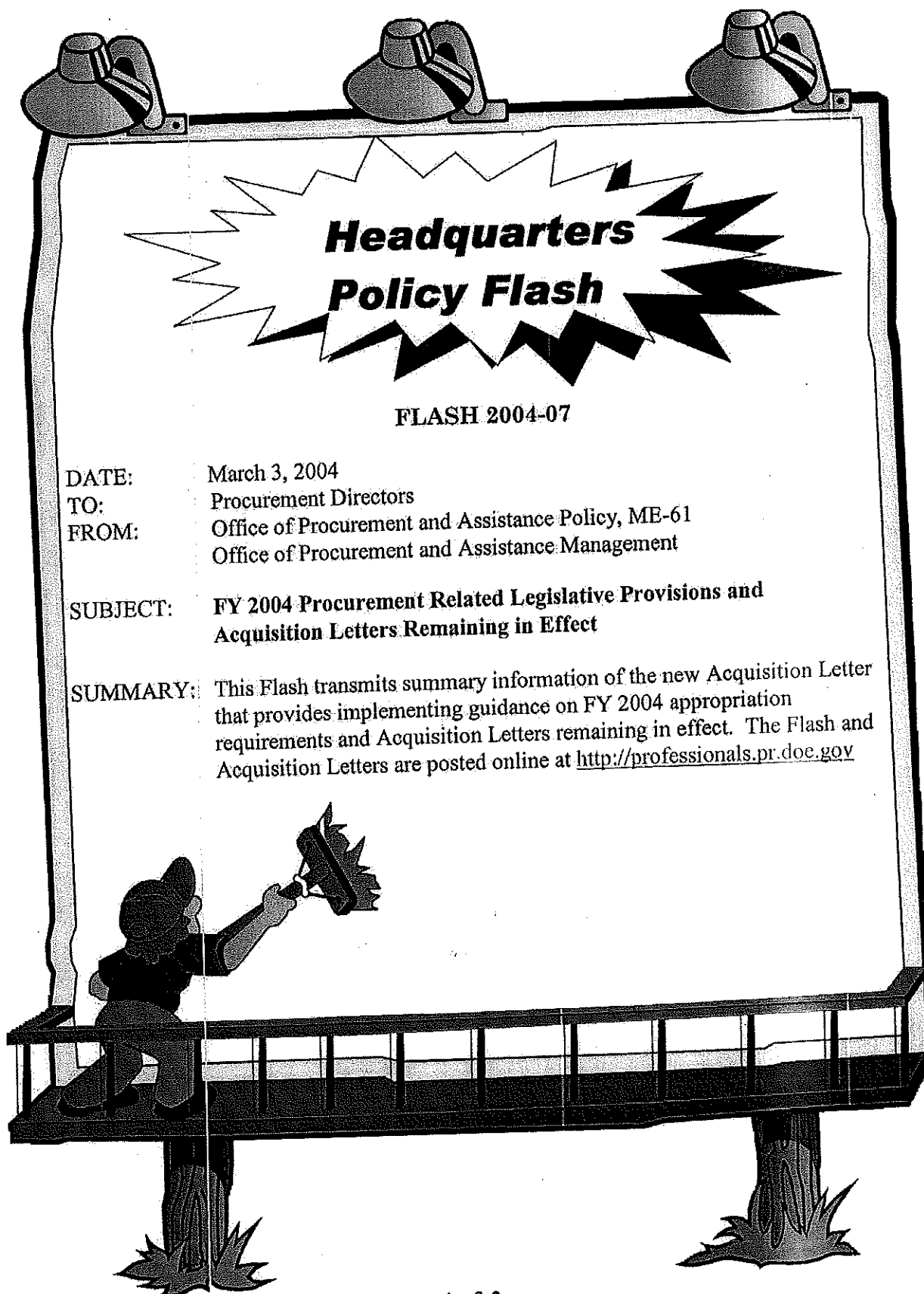


Michael Fischetti,  
Acting Director  
Office of Procurement and  
Assistance Policy, OMBE

Attachments

cc: PPAG Members





## **FLASH 2003-07**

**March 3, 2004**

### **1. Acquisition Letter 2004-02 - FY 2004 Legislation Provisions (dated March 1, 2004)**

#### **Energy and Water Act**

AL-2004-02 provides guidance regarding the implementation of Section 301, 304, 307, 501, 502, and Legislative Direction as provided in the Energy and Water Development Appropriations Act Pub. L. 108-137, also known as the E&W Act. RFP's for unfunded programs, user facilities, lobbying restrictions, and purchase of American made products are carried over from the FY 2003 Energy and Water Development Appropriations Act Pub. L. 108-7 (Division D). However, while the provision regarding competition still exists in the FY 2004 legislation, the direction provided by Congress regarding the extend/compete process for 5 Management and Operating (M&O) contracts is significantly changed..

The Energy and Water Development Appropriations Act, 2004, section 301 prohibits the use of appropriated funds to make payments for contracts to manage and operate five named Federally Funded Research and Development Centers, unless not later than 60 days after enactment the Secretary publishes in the Federal Register and submits to the Committees on Appropriations of the House and Senate, his decision to use competitive procedures for the award of each contract. The five noncompetitive Management and Operating contracts are Ames National Laboratory, Argonne National Laboratory, Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory, and Los Alamos National Laboratory. The Conference Committee recognized the challenge of competing the five contracts and provided authority to extend current contract terms for up to 2 years.

In addition to the 5 FFRDCs stated above, the Secretary announced on January 30, 2004, that 5 more management and operating contracts for the Department's science and national defense laboratories would be competed in a manner consistent with those contracts cited in the Energy and Water Development Appropriations Act, 2004. This action joins the evaluation and implementation of the recommendations of the Blue Ribbon Commission on the Use of Competitive Procedures for DOE laboratories with the tenets of Section 301. This stance supports the Secretary's belief "that a competitive environment is generally desirable for the effective and efficient operation of our labs."

#### **Interior Act**

FY 2004 Department of Interior and Related Agencies Appropriations Act Pub. L. 108-108 contains four provisions relative to DOE procurement programs; Section 301 addresses public availability of information, Section 302 lobbying restrictions, Section 340 requires the Department to identify funds requested to perform competitive sourcing studies for Interior related programs, projects, and activities, and an unnumbered provision that prohibits the preparation, issuance, or processing of procurement documents for unfunded programs.

**FLASH 2004-07**

**March 3, 2004**

Guidance implementing these provisions is contained in the attached Acquisition Letter.

**Defense Act**

The National Defense Authorization Act for FY 2004, Pub. L. 108-136, which may be cited as the Services Acquisition Reform Act of 2003 (SARA), contains various acquisition reform provisions. These provisions require uniform government-wide implementation and will be processed through the usual FAR regulatory process.

**2. Acquisition Letter (FAL) 2004-01**

AL 2004-01, "Acquisition Letters remaining in Effect" was issued on February 25, 2003.

For questions related to this Acquisition Letter, contact Denise P. Wright on (202) 586-6217 or via e-mail at [Denise.Wright@hq.doe.gov](mailto:Denise.Wright@hq.doe.gov)



Michael P. Fischetti, Acting Director  
Office of Procurement and  
Assistance Policy

Attachments

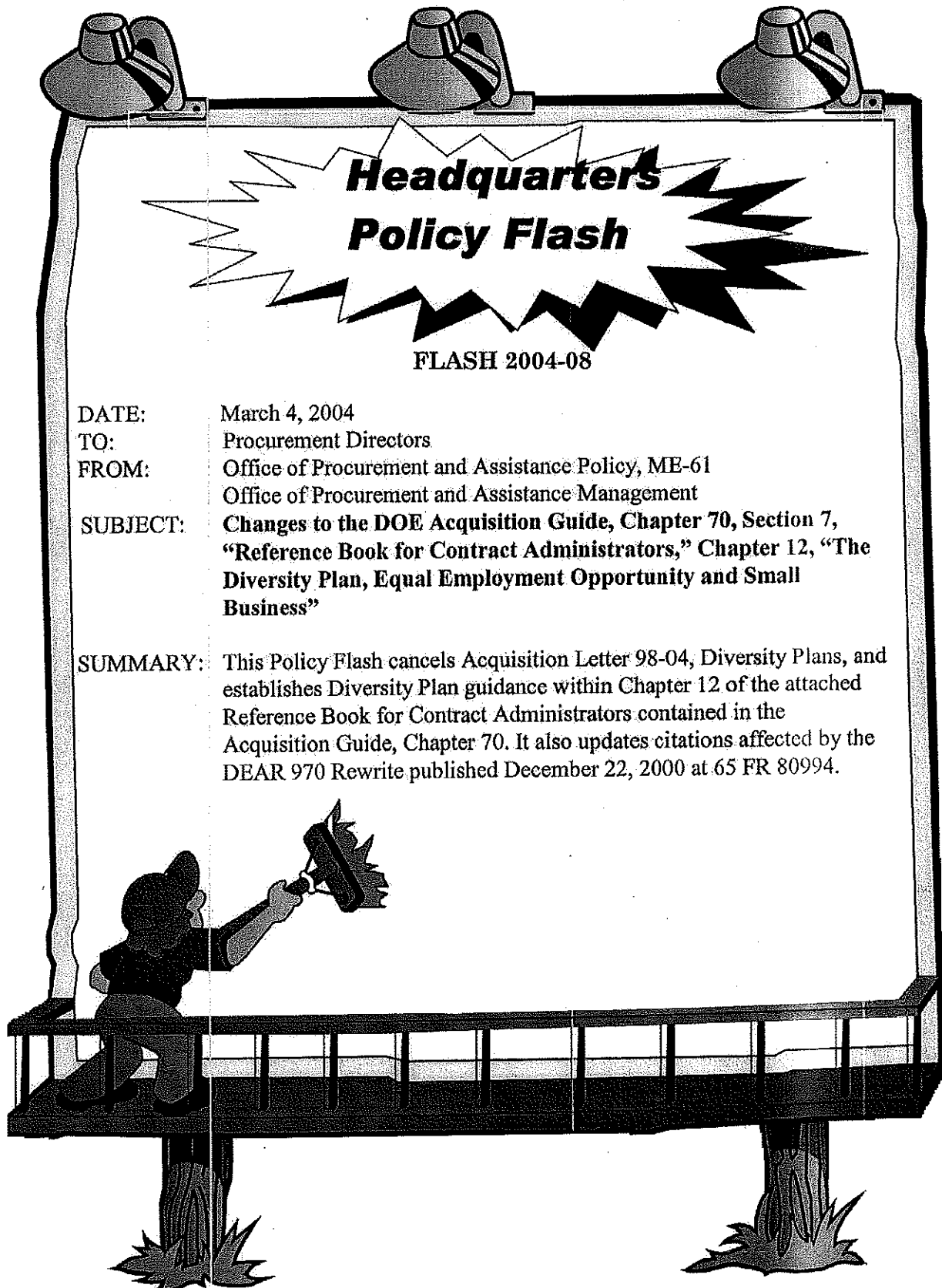
cc: PPAG Members

## **Office of Procurement and Assistance Policy, ME-61**

### **Secretary Duties:**

#### **“Assignments”**

- 1) Advance Award Notification Packages
- 2) Correspondence - to include memos/letters
- 3) Energy Time and Attendance (ETA) (done every other week on Thursdays)
- 4) Bob's timecard sheet (to be done in the mornings)
- 5) Travel Manager 8.0
- 6) Policy Flashes
- 7) Acquisition Guides
- 8) Acquisition Letters
- 9) Assisting w/ edits and formatting of Rulemakings
- 10) Financial Assistance Letters
- 11) Correspondence Tracking System Actions (updating correspondence reports)
- 12) Revcom Actions (updating revcom actions on correspondence reports)
- 13) Procurement Request Authorization Forms
- 14) Pick-up of incoming mail
- 15) Supply Retrieval
- 16) Updates to notebooks to include Policy Flashes, Acquisition and Financial Assistance Letters, Acquisition Guide, etc.



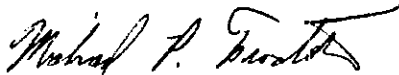
**FLASH 2004-08**

**March 4, 2004**

The Diversity Plan guidance provided in Chapter 12 of the Reference Book for Contract Administrators establishes procedural requirements associated with DEAR Clause 970.5226-1, Diversity Plan, which is a required clause in all Management and Operation (M&O) contracts and provides guidance in the elements and factors to consider in evaluating the contractor's performance against an approved plan. The guidance acts as an assessment tool, linking the Diversity Plan's goal to obtain contractor commitment to diversity sensitivity and inclusion in all aspects of its business practices, the workplace, and relations with the community at large, with performed outcome.

In addition, Chapter 12 is updated to provide consistency with implemented regulations.

Questions concerning this Flash should be directed to Denise P. Wright on (202) 586-6217 or via e-mail at [Denise.Wright@hq.doe.gov](mailto:Denise.Wright@hq.doe.gov) or James Tower on (202) 586-4294 or via e-mail at [James.Tower@pr.doe.gov](mailto:James.Tower@pr.doe.gov)



Michael P. Fischetti, Acting Director  
Office of Procurement and  
Assistance Policy

cc:  
PPAG Members

## **CHAPTER 12**

### **THE DIVERSITY PLAN, EQUAL EMPLOYMENT OPPORTUNITY, AND SMALL BUSINESS**

(Revised April 4, 2003)

#### **WHAT ARE THE BASIC PRINCIPLES AND OBJECTIVES OF THE DIVERSITY PLAN, EQUAL EMPLOYMENT OPPORTUNITY AND SMALL BUSINESS?**

1. Plan for and create a more diverse work force.
2. Maintain, update, establish goals, and report on Equal Employment Opportunity, and Subcontracting Plan.
3. Develop an integrated approach to managing Diversity across business operations.
4. Identify Energy Policy Act related requirements and make awards to targeted groups.

#### **WHY IS THE DIVERSITY PLAN, EQUAL EMPLOYMENT OPPORTUNITY, AND SMALL BUSINESS IMPORTANT?**

Department of Energy (DOE) policy recognizes that full utilization of the talents and capabilities of a diverse work force is critical to the achievement of its mission. The principal goals of this policy are to:

- Develop innovative strategies to increase opportunities; and
- Foster and enhance partnerships with small, small disadvantaged, and women-owned small businesses; and minority educational institutions.

This includes minority educational institutions which are Historically Black Colleges and Universities, Hispanic serving educational initiatives, and Native American Institutions.

#### **What does this chapter cover?**

This Chapter addresses:

- Major elements in the Diversity Plan and factors to consider in evaluating the contractor's performance against an approved plan;
- Equal Employment Opportunity and Affirmative Action activities, roles, and relationships of the prime contractor, its subcontractors, and the DOE; and
- The contractor's interrelationship with Small Businesses.



### **What is the goal of the Diversity Plan?**

The objective of the Diversity Plan, as implemented by the Department of Energy Acquisition Regulation (DEAR) 970.5226-1, "Diversity Plan" clause and the requirement for a "total package" Diversity Plan, is to obtain the contractor's commitment to diversity sensitivity and inclusiveness in all aspects of its business practices, the workplace, and relations with the community at large.

DOE contractors have the opportunity to be innovative with Diversity Plans; to plan and invoke strategies under Government awards to increase opportunities for:

- Minorities,
- Women,
- Veterans,
- American Indians,
- Hispanics, and
- Other groups of workers,

who have not had the chance to fully use their talents.

### **What is the Affirmative Action Program?**

Affirmative Action is defined as a contractor's program which complies with Department of Labor regulations to ensure Equal Employment Opportunity for minorities, women, persons with disabilities, and veterans. Executive Order (EO) 11246, "Equal Employment Opportunity," as amended by EO 11375, provides Equal

Employment Opportunity and Affirmative Action guidelines for Federal contractors regarding race, color, gender, religion, and national origin. The EOs prohibit Federal contractors and Federally-assisted construction contractors and subcontractors, who do over \$10,000 in Government business in one year, from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. The EOs also require Government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment. Thus, a contractor's Plan refers to a contractor's program that complies with Department of Labor regulations to ensure equal opportunity in employment.

### **What are the objectives of the Department's Small Business, HUBZone Small Business, Small Disadvantaged Business, and Women-Owned Small Business Programs?**

It is the policy of the government to provide maximum practicable opportunities in its acquisitions to small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. Such concerns shall also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. (Federal Acquisition Regulation (FAR) 19.201)

DOE's prime management contracts exceed \$500,000 making it a requirement that an acceptable Subcontracting Plan be submitted, incorporated into, and made a material part of the contract. (FAR 19.705-

5(a)(5) and 19.702(a)(1)). The Subcontracting Plan must establish socio-economic objectives for small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors.

Section 221 of Public Law 95-507 requires that the heads of Federal agencies, after consultation with the Small Business Administration (SBA), establish contract goals for small and small disadvantaged businesses. EO 132138 requires goals for prime contracts to women-owned firms.

The Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) established a five percent government-wide goal for contract awards to woman-owned small businesses. DOE is one of eleven agencies identified by the SBA to participate in the Woman-Owned Small Business Procurement Pilot Program. The Program was established to enhance outreach, training and marketing assistance to woman-owned small businesses.

#### **Where can I go for more information on these programs?**

Further information may be obtained from the Office of Economic Diversity home page which is also listed in Appendix B:

<http://www.hr.doe.gov/ed/index.html>

#### **What is the role of the Contracting Officer under these programs?**

The Administrative Contracting Officer (ACO) (usually the Contracting Officer (CO) at DOE) is responsible at FAR 19.706

for assisting in evaluating Subcontracting Plans, and for monitoring, evaluating, and documenting contractor performance under the clause at FAR 52.219-9, "Small Business Subcontracting Plan," and the Subcontracting Plan included in the contract.

### **WHAT IS A GENERAL DESCRIPTION OF THE PROCESSES UNDER THE DIVERSITY PLAN, EQUAL EMPLOYMENT OPPORTUNITY AND SMALL BUSINESS?**

#### **A. The Diversity Plan**

As an important element of contract reform, the Department requires that its contractors take appropriate action to develop a comprehensive and integrated approach to managing diversity across their business operations. This requirement is implemented through the inclusion of a diversity contract clause in major facilities management contracts. The clause requires submission of a Diversity Plan, which is necessary to implement DOE's diversity policy.

The information in the Diversity Plan is submitted per DEAR 970.5226-1 to the Contracting Officer (CO) for approval within 90 days after the effective date of the contract and updated annually thereafter or with the contractor's annual fee proposal. The Diversity Plan is used by DOE COs to evaluate contractor performance ensuring compliance with the requirements of the clause and the extent to which the plan demonstrates the contractor's commitment to diversity, cultural sensitivity, and

inclusion in all aspects of its business practices, the workplace, the contractor's workforce, and relations with the community at large. It is also used to determine whether DOE's policy of developing innovative strategies to increase opportunities for small, minority, women-owned businesses, and educational institutions is being advanced.

The CO obtains the advice and recommendations from an official of the Office of Civil Rights and Diversity, in the case of a Headquarters procurement, in the case of a Field Office procurement, a senior manager designated by the Head of the Contracting Activity who is independent of the procurement organization, e.g., the Field Diversity Program Manager. As necessary the CO consults with other subject matter experts during the review process, including the Office of Small and Disadvantaged Business Utilization (OSDBU), General Counsel, Public Affairs, etc. The CO includes the approved Plan in the official contract file.

The clause requires the Plan to include innovative strategies for increasing opportunities to fully use the talents and capabilities of a diverse work force. The Plan also addresses, at a minimum, the Contractor's approach for promoting diversity through:

- Contractor's work force,
- Educational outreach,
- Community involvement and outreach,
- Subcontracting,

- Economic development including technology transfer, and
- Prevention of profiling based on race or national origin.

The Diversity Plan should be tailored to the unique circumstances of the individual contract site (e.g., mission, organization culture). The contractor's business and management strategies for diversity should focus on creating a work environment that accepts and respects the characteristics, skills, and experiences that each individual brings to the work environment consistent with the Department's policy on diversity (see DEAR 970.2671-1) and the Department's objectives for its Diversity Program (see DOE O 311.1A).

Accordingly, the contractor's Diversity Plan should address the linkage between the following elements and the contractor's organizational business and management strategies for diversity, including the contractor's vision and definition of diversity:

#### • • Contractor's Workforce

The Department's contracts contain clauses on Equal Employment Opportunity (EEO) and Affirmative Action (AA). The Plan may discuss how the contractor has or plans to establish and maintain result-oriented EEO and AA programs in accordance with the requirements of these clauses, and how the contractor's organization includes or plans to include elements/dimensions of diversity that might enhance such programs

- • **Community Involvement and Outreach**

The Plan may discuss the contractor's strategies to foster relationships with Minority Educational Institutions and other institutions of higher learning (e.g., Historically Black Colleges and Universities, Hispanic serving institutions, and Native American institutions) to increase their participation in federally sponsored programs through subcontracting opportunities, research and development partnerships, and mentor-protégé relationships. The contractor's Plan may also discuss cooperative programs which encourage underrepresented students to pursue science, engineering, and technology careers.

- • **Educational Outreach**

The Plan may discuss the contractor's community relations activities in support of diverse elements of the local community, for example: support for science, mathematics, and engineering education; support for community service organizations; assistance to governmental and community service organizations and for equal opportunity activities; and community assistance in connection with work force reduction plans; strategic partnerships with professional and scientific organizations to enhance recruitment into all levels of the organization; and use of direct sponsorship or making individual employees available to work with a specific community activity.

- • **Subcontracting**

If appropriate to the contractor, the contract will contain FAR clause 52.219-9, entitled, "Small Business Subcontracting Plan," and other small business related clauses. Additionally, the solicitation under which the contractor proposed may have contained additional guidance on small business subcontracting.

The Plan may discuss outreach activities and achievements for enhancing subcontracting opportunities for small businesses, small disadvantaged businesses (e.g., small businesses owned and controlled by socially and economically disadvantaged individuals, tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations), small business firms located in historically underutilized business zones, woman-owned small businesses, and veteran-owned (including service-disabled veteran-owned) small businesses.

The Plan may also discuss actual or planned participation in the Department's Mentor-Protégé Program

- • **Economic Development (including technology transfer)**

Some of the Department's contracts include clauses dealing with technology transfer. Planning or activities developed under such clauses may apply to this element of the Diversity Plan. Additionally, subcontracting policies and activities undertaken or

planned by the contractor with small, small disadvantaged, woman-owned, and service-disabled veteran small business concerns for the purpose of assisting the economic development of, or transferring technology to, such business concerns may be discussed.

- • **Prevention of Profiling Based on Race or National Origin**

Profiling pertains to those practices that scrutinize, target or treat employees or applicants for employment differently or single them out or select them for unjustified additional scrutiny, based on race or national origin. The Plan may discuss the contractor's approach to preventing prohibited profiling practices, including strategies for early detection of potential profiling in the contractor's business activities (e.g., personnel actions, security clearances).

The Plan may also discuss procedures intended to expedite timely resolution of adverse actions. Methodologies for benchmarking, sharing best practices, or lessons learned in the prevention of prohibited profiling. Forums available to employees for expressing concerns or issues about prohibited profiling practices in the workplace.

The Department evaluates the contractor's performance against the requirements of the Diversity Plan to determine the extent to which the contractor's performance complies with the approved Plan. Evaluated performance that is less than that required under the contract may result in either a reduction in the amount of award fee awarded to the contractor or, for those

contracts not containing award fee provisions, other measures.

For contracts that provide for an Award Fee, Heads of Contracting Activities may evaluate the contractor's performance against its Diversity Plan under the award fee portion of the annual Contract Performance Evaluation and Measurement Plan (or similar document) of the contract. To the extent that general business management is a factor in the evaluation of the contract performance relating to award fee, the Diversity Plan is included as an element in that evaluation. If any elements of the Diversity Plan are already evaluated elsewhere (e.g., subcontracting plan or technology transfer) under the contract for the purposes of award fee, those elements must not be evaluated again under the Diversity Plan factor.

## **B. Equal Employment and Affirmative Action**

### **General**

The U.S. Department of Labor's Office of Federal Contract Compliance Programs has been committed, since 1965, to ensuring that Government contractors comply with Equal Employment Opportunity and the affirmative action provisions of their contracts. Also, that office administers and enforces EO 11246, as amended.

EO 11246, as amended, sets forth the Equal Opportunity Clause (which can be found at FAR 52.222-26) and requires that all agencies include the clause in all nonexempt contracts and subcontracts (exemptions listed below). The EO also requires that all agencies act to ensure compliance with the

clause. It also requires compliance with the regulations of the Secretary of Labor to promote the full realization of equal opportunity for all persons, regardless of race, color, religion, sex, or national origin.

FAR 22.803 states the head of each agency is responsible for ensuring that the requirements are carried out within the agency. They are also responsible for cooperating with and assisting the Office of Federal Contract Compliance Programs in fulfilling its responsibilities.

Additionally, FAR 22.802 states the CO will approve no contract, modification, or subcontract with a person found ineligible by the Deputy Assistant Secretary for Federal Contract Compliance, U. S. Department of Labor, for reasons of noncompliance with the requirements of EO 11246. COs and contractors are not to contract for supplies or services in a manner so as to avoid applicability of the EO 11246 requirements. All contractor disputes related to compliance are handled according to the rules, regulations, and relevant orders of the Secretary of Labor.

All or part of the requirements of EO 11246 may be excluded from a contract for very limited reasons articulated at FAR 22.807(a). Some exemptions apply even through a contract or subcontract contains the Equal Opportunity clause. The nuances of these exemptions are at FAR 22.807(b) and fall into categories such as:

- Transactions of \$10,000 or less,
- Work outside the United States,
- Contracts with state or local governments,

- Work on or near Indian reservations,
- Facilities not connected with contracts, and
- Indefinite-quantity contracts where the CO has reason to believe the amount ordered in any year under the contract will not exceed \$10,000.

### **What does an Affirmative Action Program do?**

A written Plan helps the contractor identify and analyze participation and utilization of women and minorities in the contractor's workforce. If there are problems, the contractor will specify in its Affirmative Action Program the specific procedures it will follow and the good faith efforts it will make to provide equal employment opportunity. Expanded efforts in outreach, recruitment, training, and other areas are some of the affirmative steps contractors can take to help members of the protected group compete for jobs on equal footing with other applicants and employees.

Affirmative action is not preferential treatment. It does not mean that unqualified persons should be hired or promoted over other people. What affirmative action does mean is that positive steps must be taken to ensure Equal Employment Opportunity for traditionally disadvantaged groups.

### **When are non construction - Affirmative Action Programs developed?**

Unless exempt, each non-construction prime contractor and each subcontractor with 50 or more employees, and:

- Either a contract or subcontract of \$50,000 or more; or
- Government bills of lading that in any 12-month period total, or can reasonably be expected to total, \$50,000 or more;

is required at FAR 22.804-1 to develop a written affirmative action program for each of its establishments.

Each contractor and subcontractor must develop its written affirmative action program within 120 days from the commencement of its first such Government contract, subcontract, or Government bill of lading.

### **How do construction - Affirmative Action Programs apply?**

Construction contractors that hold a nonexempt Government construction contract are required to meet:

- The contract terms and conditions citing affirmative action requirements applicable to covered geographical areas or projects; and
- Applicable requirements of 41 Code of Federal Regulations (CFR) 60-1 and 60-4.

Each agency maintains a listing of covered geographical areas subject to affirmative action requirements. That listing specifies goals for minorities and women in covered construction trades. Information concerning, and additions to, this listing will be provided to the principally affected COs in accordance with agency procedures. Any CO contemplating a construction project in excess of \$10,000 within a geographic area not known to be covered by specific affirmative action goals shall request instructions on the most current information from the Office of Federal Contract Compliance Programs regional office.

COs give written notice to the Office of Federal Contract Compliance Programs regional office within 10 working days of award of a construction contract subject to these affirmative action requirements. This is in accordance with FAR 22.804-2(c). When requested by the Office of Federal Contract Compliance Programs regional office, the CO arranges a conference among contractor, contracting activity, and compliance personnel to discuss the contractor's compliance responsibilities.

### **What does Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era mean?**

The clause at FAR 52.222-35, "Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era," is used in solicitations and contracts expected to be \$10,000 or more. The exception is when the work is performed outside the United States by employees recruited outside the United States or when the agency head has waived the terms of the clause. When the clause at FAR 52.222-35 is contained in a contract or



solicitation, the clause at FAR 52.222-37, "Employment Reports on Disabled Veterans and Veterans of the Vietnam Era," is also used.

CO responsibilities with respect to waivers, furnishing of prescribed notices for posting, notices to unions with respect to collective bargaining agreements, forwarding of complaints and actions with respect to sanctions imposed by the Department of Labor, are covered under FAR 22.1303 through FAR 22.1307.

The clauses at FAR 52.222-35 and 52.222-37 describe the responsibilities of the Contractor with respect to disabled veterans and veterans of the Vietnam Era. This includes:

- Affirmative action to employ, advance in employment, and otherwise treat qualified disabled veterans without discrimination based on their disability or veteran's status;
- List employment openings, except for executive and top management positions, positions to be filled from within the contractor's organization, and positions lasting 3 days or less, with the appropriate employment service office; and
- Contractors subject to FAR 52.222-35 are required to submit Standard Form VETS-100 – Federal Contractor Veterans' Employment Report, at least annually to the Secretary of Labor, regarding employment of Vietnam era and disabled veterans.

### **What is Affirmative Action for Workers with Disabilities?**

The clause at FAR 52.222-36, "Affirmative Action for Workers with Disabilities," is used in solicitations and contracts when the contract is, or is expected to be, \$10,000 or more. The exception is when the work is to be performed outside the United States by employees recruited outside the United States or when the agency head has waived the terms of the clause.

Under FAR 22.1403 through FAR 22.1407, CO responsibilities are covered with respect to:

- Waivers,
- Furnishing of prescribed notices for posting,
- Notices to unions with respect to collective bargaining agreements,
- Forwarding of complaints, and
- Actions with respect to sanctions imposed by the Department of Labor.

The clause at FAR 52.222-36 describes the specific responsibilities of the Contractor with respect to affirmative action for workers with disabilities. Generally, Contractors are required to take affirmative action to employ, and advance in employment, qualified individuals with disabilities, without discrimination based on their physical or mental disability.

### **How is "Visa Denial" handled?**

The clause at FAR 52.222-29, "Notification of Visa Denial," is used in contracts that include the clause at FAR 52.222-26, "Equal Opportunity," if performance is required in or on behalf of a foreign country. The clause states it is a violation of EO 11246, as amended, for a contractor to refuse to employ any applicant or not to assign any person hired in the United States, on the basis that the individual's race, color, religion, sex, or national origin is not compatible with the policies of the country where the work is to be performed or for whom the work will be performed. The clause requires notifications by the contractor when it has knowledge of any employee or potential employee being denied an entry visa to a country in which the contractor is required to perform the contract, and it believes that the denial is because of race, color, religion, sex, or national origin.

### **What is "Prohibition of Segregated Facilities?"**

The clause at FAR 52.222-21, "Prohibition of Segregated Facilities," is used in contracts and subcontracts that include the clause at FAR 52.222-26, "Equal Opportunity." Contractors or subcontractors must agree that they do not and will not maintain or provide any segregated facilities at any of its establishments. They must also agree that they do not and will not permit their employees to perform their services at any location under their control where there are segregated facilities.

### **What is "Non Discrimination Because of Age?"**

Contractors and subcontractors, in connection with employment, advancement, or discharge of employees, are not to discriminate against persons because of their age. Maximum age limits for employment may not be specified in solicitations or advertisements for employees to work on Government contracts. The exception is when the age limit is based upon a bona fide occupational qualification, retirement plan, or statutory requirement. There are no special contract clauses with respect to this restriction.

### **What are the procedures for "Pre-Award Clearances?"**

Pre-award Equal Employment Opportunity clearances for contracts and subcontracts of \$10,000,000 or more (excluding construction) are required from the appropriate Office of Federal Contract Compliance Programs regional office before award of a contract (including any indefinite delivery contract or letter contract). Clearance is also required for modification of an existing contract for new effort that would constitute a contract award.

Pre-award clearance for each proposed contract and for each proposed first-tier subcontract of \$10 million or more are requested by the CO directly from the Office of Federal Contract Compliance Programs regional office(s). Verbal requests are confirmed by letter or facsimile transmission. For work performed outside the United States with employees recruited within the United States the pre-award clearance is sent to the Office of Federal

Contract Compliance Programs (OFCCP) regional office as specified in FAR 22.805(a)(3).

Pre-award clearance need not be requested if:

- The proposed contractor is listed in the OFCCP National Pre-award Registry via the web site listed in Appendix B.
- The projected award date is within 24 months of the proposed contractor's Notice of Compliance completion date in the Registry; and
- The CO documents the Registry review in the contract file.

Information included in the pre-award clearance request is listed at FAR 22.805(a)(5). Pre-award clearances are requested at least 30 days before the proposed award date. Guidance regarding when pre-award clearance can be presumed to have been received from Office of Federal Contract Compliance Programs and guidelines for awards without preaward clearance can be found at FAR 22.805(a)(7)&(8).

COs furnish the contractor with appropriate quantities of the poster entitled "Equal Employment Opportunity Is The Law".

#### **What are contractor Equal Opportunity requirements?**

The Equal Employment Opportunity clause at FAR 52.222-26 generally requires that the contractor take the following actions with respect to Equal Employment Opportunity:

- Not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. However, a preference to employ Indians living on or near an Indian reservation, in connection with employment opportunities on or near an Indian reservation, is not a violation if the intention is publicly announced.
- Take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. These shall include, but not be limited to employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.
- Post the poster entitled "Equal Employment Opportunity Is The Law" in conspicuous places available to employees and employment applicants.
- State in all advertisements for employees that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.
- Send to each labor union or representative of workers with which it has a collective bargaining agreement the Notice of the Contractor's commitments under the clause and to post copies of the notice in conspicuous places.

- Comply with EO 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor.
- Furnish to the contracting agency all information required by EO 11246, as amended, and by the rules, regulations and orders of the Secretary of Labor.
- File Standard Form 100 (EEO-1). Filing must be done within 12 months preceding the date of contract award or within 30 days after contract award.
- Permit access to its premises during normal business hours to the contracting agency or the Office of Federal Contract Compliance Programs for the purpose of conducting on-site compliance evaluations and complaint investigations. The contractor shall permit the inspection and copying of any pertinent material relevant to any matter under investigation.
- Include the terms and conditions of subparagraphs (b)(1) through (b)(11) of the clause at FAR 52.222-26 in every nonexempt subcontract and purchase order.
- Take such action with respect to any subcontract or purchase order as the CO may direct as a means of enforcing these terms and conditions.

**What are the Affirmative Action compliance requirements for construction?**

These requirements are set forth in the clause found at FAR 52.222-27, "Affirmative Action Compliance

Requirements for Construction." If the Contractor, or a subcontractor at any tier, subcontracts a portion of the work involving any construction trade, each such subcontract in excess of \$10,000 shall include this clause. The subcontract also must include the Notice containing the goals for minority and female participation stated in the solicitation for the contract.

If the Contractor is participating in a Hometown Plan approved by the U.S. Department of Labor in a covered area, its affirmative action obligations on all work in the Plan area are to comply with the Plan for those trades that have unions participating in the Plan. Contractors must be able to demonstrate participation in, and compliance with, the provisions of the Plan. Contractors are also required to comply with obligations under the "Equal Opportunity" clause. The contractor is also responsible for implementing the affirmative action procedures listed in FAR 52.222-27 subparagraphs (g)(1) through (g)(16).

**C. Small Business**

By virtue of their size, all performance-based management contracts (PBMCs) within DOE are required to contain the clauses at:

- FAR 52.219-9, "Small Business Subcontracting Plan,"
- FAR 52.219-8, "Utilization of Small Business Concern," and
- FAR 52.219-16, "Liquidated Damages – Subcontracting Plan."

As set forth at FAR 19.705-5(a)(5), acceptable Subcontracting Plans are required to be incorporated into and made a material part of the contract.

**What must each Subcontracting Plan include?**

In accordance with FAR 19.704, each Subcontracting Plan must include the following:

- Separate percentage goals for using small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors;
- A statement of the total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;
- A description of the principal types of supplies and services to be subcontracted and an identification of types planned for subcontracting to small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;
- Description of the method used to develop the subcontracting goals;
- A description of the method used to identify potential sources for solicitation purposes;
- A statement as to whether or not the contractor included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;
- Name of the employee who will administer the subcontracting program and a description of the duties of the individual;
- A description of the efforts the contractor will make to ensure that small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts;
- Assurances that the contractor will include the clause at FAR 52.219-8, "Utilization of Small Business Concerns," in all subcontracts that offer further subcontracting opportunities and that the contractor will require all subcontractors (except small business concerns) that receive subcontracts in excess of \$500,000 (\$1,000,000 for construction) to adopt a plan that complies with the requirements of the clause at FAR 52.219-9.
- A description of the types of records that will be maintained concerning procedures adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the contractor's efforts to locate small business, HUBZone small business, small disadvantaged

business concerns and to award subcontracts to them.

- Assurances that the contractor will cooperate in any required studies or surveys, submit periodic reports, submit SF 294 and SF 295 in accordance with instructions on the forms, and ensure that its subcontractors agree to submit SF 294 and SF 295.

DOE's Subcontracting Reporting System, which tracks the small business results for DOE's contractors from data contained on Standard Forms 294 and 295, has been redesigned and is available for tracking and recording subcontracting data. This new system eliminates the shipment of diskettes and paper between contractors and Heads of Contracting Activities (HCAs) and DOE Headquarters. Contractors enter the forms via a World Wide Web browser, and the data will flow from the contractor to the HCA and from the HCA to Headquarters via the Internet. The "U.S. Department of Energy Office of Procurement and Assistance Management Office of Management Systems Subcontracting Reporting System Handbook" is electronically available through the web address below. Please go to the website address <http://professionals.pr.doe.gov/> and access "Data Systems, Information and Forms." You will find the Handbook at the resulting web site "Handbooks and Forms."

**When can a "Subcontracting" incentive be included in the contract?**

In accordance with FAR 19.708(c)(1), a clause substantially the same as the incentive subcontracting clause at FAR

52.219-10 may be used when additional and unique contract efforts could significantly increase subcontracting awards to small business, HUBZone small business, or women-owned small business concerns (see also FAR 19.705-4(c)).

However, as set forth at FAR 19.708(c)(3), the clause at FAR 52.219-10 is not be used when small business, HUBZone small business and women-owned small business subcontracting is one of the factors to be considered in determining the award fee in a cost-plus-award-fee contract.

Additionally, in accordance with FAR 19.1204(c), the contracting officer may include a clause substantially the same as FAR 52.219-26, "Small Disadvantaged Business Participation Program-Incentive Subcontracting." The contracting officer may include an award fee provision in lieu of the incentive; in such cases, however, the contracting officer shall not use the clause at 52.219-26.

In accordance with FAR 19.705-1, when using any contractual incentive provision based upon rewarding the contractor monetarily for exceeding goals in the Subcontracting Plan, the CO must ensure that the goals are realistic. The CO must also ensure any rewards for exceeding goals are commensurate with the efforts the contractor would not have otherwise expended. The ability to satisfy these conditions may be challenging. Incentive provisions should be negotiated, if at all, only after reaching agreement on the Subcontracting Plan.

Various approaches may be used in the development of such incentives. They can take many forms, from a fully quantified

schedule of payments based on actual subcontract achievement to an award-fee approach employing subjective evaluation criteria. However, historically DOE has not used objective incentives under its PBMCs but rather has evaluated such socioeconomic areas subjectively under award fee and similar arrangements.

### **Who reviews the Subcontracting Plan?**

In accordance with FAR 19.705-4, the CO reviews the Subcontracting Plan for adequacy, and ensures that the required information, goals, and assurances are included.

No detailed standards apply to every Subcontracting Plan. Each Plan must be considered in terms of the circumstances of the particular acquisition including:

- The previous involvement of small business concerns as prime contractors or subcontractors in similar acquisitions,
- Proven methods of involving small business concerns as subcontractors in similar acquisitions, and
- The relative success of methods the contractor intends to use to meet the goals and requirements of the Plan, as evidenced by records maintained by contractors.

The acceptability of the Plan shall be based on the negotiation of each of the required elements of the Plan (see FAR 19.704). Subcontracting goals should be set at a level that the parties reasonably expect can result from the contractor expending good faith

efforts to use small business, HUBZone small business, small disadvantaged business, and women-owned small business subcontractors to the maximum practicable extent. Care should be taken to ensure that unreasonably low goals have not been submitted to minimize exposure to liquidated damages and to avoid the administrative burden of substantiating good faith efforts.

Particular attention should be paid to the identification of steps, that, if taken, would be considered a good faith effort. No goal should be negotiated upward if it is apparent that a higher goal will significantly increase the Government's cost or seriously impede the attainment of acquisition objectives. In determining acceptability of a Plan, the contractor's past performance in awarding subcontracts for the same or similar products or services to small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns should be considered. Performance of other contractors on similar efforts may be considered.

The CO ensures that the goals offered are attainable in relation to:

- Subcontracting opportunities available,
- The pool of eligible subcontractors available to fulfill subcontracting opportunities, and
- The actual past performance of the contractor in fulfilling goals specified in prior Plans.

The contractor's make-or-buy policy or program should not conflict with the



Subcontracting Plan. Also the subcontracting potential should take into consideration the:

- Make-or-buy policies or programs;
- Nature of the supplies or services to be subcontracted;
- Known availability of small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in the geographical areas where the work will be performed; and
- Contractor's contractual relationship with its suppliers.

The CO can also advise the contractor of available sources of information as well as any specific concerns known to be potential subcontractors especially if proposed goals are questionable and more realistic and acceptable goals need to be developed.

In any solicitation requiring submission of a Subcontracting Plan, the CO shall provide the Small Business Administration resident procurement center representative a reasonable period of time to review the solicitation and to submit advisory findings.

#### **For what is the CO responsible in awards involving Subcontracting Plans?**

As set forth at FAR 19.705-5, the CO must:

- Consider the contractor's compliance with previous Subcontracting Plans in determining contractor responsibility; Assure that a Subcontracting Plan was submitted when required;

- Notify the SBA resident procurement center representative of the opportunity to review the proposed contract including the Plan and supporting documentation in sufficient time for submission of advisory recommendations back to the CO;
- Determine any fee that may be payable if an incentive is used in conjunction with the Subcontracting Plan; and
- Ensure that an acceptable Plan is incorporated into and made a material part of the contract.

Letter contracts shall contain a preliminary Plan addressing the requirements of FAR 19.704 and in such cases, the final Plan must be negotiated with 90 days after award or before definitization.

#### **What are the CO's responsibilities following award of the contract?**

The CO who approved the Plan is responsible for notifying the Small Business Administration of the award by sending a copy of the award document to the Area Director, Office of Government Contracting, in the Small Business Administration area office where the contract will be performed.

COs are also responsible for:

- Giving the assigned Small Business Administration resident procurement center representative, if any, a copy of the final negotiated Subcontracting Plan that was incorporated into the contract or contract modification;
- Monitoring, evaluating, documenting

contractor performance under the Small Business Subcontracting Plan clause at FAR 52.219-9 and under the Subcontracting Plan in the contract; and

- Initiating action to assess liquidated damages upon receipt of reliable evidence to indicate that such action is warranted and taking action to enforce the terms of the contract if the contractor is failing to comply in good faith with the Subcontracting Plan.

#### **What happens if the contractor fails to comply with a Subcontracting Plan?**

As provided by FAR 19.705-7, when a contractor fails to make a good faith effort to comply with a Subcontracting Plan, liquidated damages are paid by the contractor. The amount of damages attributable to the contractor's failure to comply shall be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal.

If a contractor has failed to meet its subcontracting goals the CO reviews all available information for an indication that the contractor has not made a good faith effort to comply with the Plan. If no such indication is found the CO documents the file accordingly. If the CO decides that there was not a good faith effort, a written notice is given to the contractor specifying the failure and providing at least a 15 working day response time.

Notification requirements can be found in FAR 19.705-7(c). If after consideration of all data, the CO finds that the contractor failed to make a good faith effort to comply with its Plan, a final decision is issued

requiring the contractor to pay liquidated damages in a stated amount, subject to the Disputes clause.

#### **What are Energy Policy Act requirements regarding subcontracting?**

DEAR sections 952.226-70, 952.226-71, 952.226-72, 952.226-73, and 926.70 and section 3021(a) of the Energy Policy Act provide that the Department should award not less than 10 percent of the total combined amounts obligated for contracts and subcontracts in the performance of Energy Policy Act work to certain target groups. These target groups are small business concerns owned and controlled by socially and economically disadvantaged individuals or by women, historically black colleges and universities. Colleges and universities having a student body in which at least 20 percent of the students are Hispanic Americans or Native Americans (collectively referred to as "Energy Policy Act Target Groups") are also target groups.

Acquisition Guide, Chapter 26, contains a list of DOE budget line items that are most likely to involve Energy Policy Act work. Solicitations for Energy Policy Act procurements are to contain the provisions at:

- DEAR 952.226-70, "Subcontracting Goals Under Section 3021(a) of the Energy Policy Act of 1992" and
- DEAR 952.226-73, "Energy Policy Act Target Group Representation."

Prime management contracts for Energy Policy Act requirements are required to contain the provisions at:

- DEAR 952.226-71, "Utilization of Energy Policy Act Target Entities," and
- DEAR 952.226-72, "Energy Policy Act Subcontracting Goals and Reporting Requirements."

In addition to their obligations under other provisions of their contracts, prime contractors subject to Energy Policy Act must provide their best efforts to competitively award subcontracts to entities from among the Energy Policy Act target groups.

Goals must be inserted into the clause at DEAR 952.226-72 for award of subcontracts to Energy Policy Act Target Groups. The contractor, in performance of the contract, agrees to provide its best efforts to award subcontracts as specified and to report on its progress against the goals as an addendum to the SF 294 and SF 295. Additionally, as per DEAR 970.2670, the attendant reporting requirements are included in the Subcontracting Plan for management and operating contracts and apply to the annual dollar obligations specifically provided to the management and operating contractor for competitively awarded subcontracts that fulfill Energy Policy Act requirements.

### **What is the DOE Mentor-Protege Program?**

The DOE Mentor-Protege Program is intended to encourage DOE prime contractors to assist certain small businesses and minority educational institutions in enhancing their capabilities to perform contracts and subcontracts for DOE and other Federal agencies. The small

businesses and minority educational institutions covered by the program are:

- Small disadvantaged firms certified by the Small Business Administration under Section 8(a) of the Small Business Act (8(a)s),
- Other small disadvantaged businesses,
- Historically Black Colleges and Universities, and other minority institutions of higher learning,
- Women-owned small businesses, and
- Small business concerns owned and controlled by service disabled veterans

The program seeks to foster long term relationships between DOE prime contractors and these small business entities and minority institutions of higher learning and to increase the overall number of these small business entities and minority institutions that receive DOE contract and subcontract awards. The regulations providing for this program are at DEAR 919.70. There is a solicitation provision, at DEAR 952.219-70, to notify proposers of the existence of the program.

## **WHAT ARE MY MAJOR ROLES AND RESPONSIBILITIES IN THE AREA OF THE DIVERSITY PLAN, EQUAL EMPLOYMENT OPPORTUNITY, AND SMALL BUSINESS?**

On the following pages are the major roles and responsibilities of members of the contract administration team. Key sections of documents have been summarized for ease of reference. Please bear in mind that the referenced documents themselves are controlling and should be consulted for a complete discussion of the various roles, responsibilities and requirements. Additionally, other documents, not listed here, may contain other roles and responsibilities.

Note: Various responsibilities on the following pages are marked with an asterisk (\*). This signifies that the responsibility is not specifically assigned to this individual by a clause, regulation, or procedure. It is suggested because:

(1) The responsibility is necessary to perform Government contract administration responsibilities; and is either commonly performed by this individual or reflects "good business practice."

(2) The responsibility is stated in the reference as a DOE/Government responsibility; and is either commonly performed by this individual or reflects "good business practice."

Local guidance may determine who specifically is obligated to perform the responsibility.

### **AGENCY HEAD**

May waive any or all terms of FAR 52.222-35 or 52.222-36 clauses with concurrence of the Deputy Assistant Secretary for Federal Contract Compliance Programs, Department of Labor if in the national interest or essential to the national security.

**[FAR 22.1303]**

Ensure Equal Opportunity requirements are carried out.

Cooperate with and assist the Office of Federal Contract Compliance Programs.

**[FAR 22.803]**

## **HEAD OF THE CONTRACTING ACTIVITY**

Ensure that the Small Business policies and procedures are used to the maximum extent feasible. Ensure that contractor purchasing systems of contractors for the management and operation of major DOE sites and facilities include effective small business advocacy programs to support the Department's responsibility to award a fair proportion of DOE appropriated dollars to small businesses.

**[Acquisition Letter 2000-02]**

\*Ensure, to the extent deemed appropriate, that for contracts that provide for an Award Fee the contractor's performance against its Diversity Plan is evaluated under the award fee portion of the annual Contract Performance Evaluation and Measurement Plan (or similar document) of the contract. To the extent that general business management is a factor in the evaluation of the contract performance relating to award fee, the Diversity Plan is included as an element in that evaluation.

## **PROGRAM OR REQUIREMENTS PERSONNEL**

Identify on the purchase request whether the procurement is an Energy Policy Act requirement.

**[Acquisition Guide, Chapter 26]**

## **CONTRACTING OFFICER**

Ensure subcontracting goals are realistic and any rewards for exceeding the goals are commensurate with the efforts the contractor would not have otherwise expended.

**[FAR 19.705-1]**

Provide the Small Business Administration resident procurement center representative a reasonable period to review solicitations requiring submission of a Subcontracting Plan before the solicitation is issued.

**[FAR 19.705-3]**

Review the Subcontracting Plan for adequacy ensuring that the required information, goals, and assurances are included.

**[FAR 19.705-4]**

Ensure an acceptable Subcontracting Plan is incorporated into and made a material part of the contract.

**[FAR 19.705-5]**

\* ACO (usually CO at DOE) assists in evaluating subcontract plans, and for monitoring, evaluating, and documenting contractor performance of Subcontracting Plans.

**[FAR 19.706]**

Give written notice to the Office of Federal Contract Compliance Program regional office within 10 working days of award of a construction contract subject to these affirmative action requirements. When requested by the Office of Federal Contract Compliance, arrange a conference among contractor, contracting activity, and compliance personnel to discuss the contractor's compliance responsibilities.

**[FAR 22.804-2(c)]**

\* May cancel, terminate or suspend in whole or in part if the Office of Federal Contract Compliance Programs determines that the contractor is not in compliance with this clause or any rule, regulation, or order of the Secretary of Labor under the procedures authorized in Executive Order 11246.

**[FAR 52.222-26]**

Not approve a contract, modification, or subcontract with a person found ineligible by the Department of Labor for reasons on noncompliance with EO 11246.

**[FAR 22.802]**

Request a pre-award clearance from the appropriate Office of Federal Contract Compliance Program regional office before award of any contract or modification.

Provide Equal Opportunity clearance in writing to prime on subcontracts \$10 million or more.

Furnish the contractor the "Equal Opportunity Is The Law" poster.

**[FAR 22.805]**

Take necessary action as soon as possible upon notification to implement any sanctions imposed on a contractor by the Department of Labor for violations of FAR 52.222-35 which may include withholding from payments otherwise due, termination or suspension of the contract, or debarment of the contractor.

**[FAR 22.1307]**

Determine if the contractor's exceeding its subcontracting goals was or was not due to the contractor's own efforts.

**[FAR 52.219-10, FAR 52.219-26]**

Decide if contractor failed to make good faith effort to comply with Subcontract Plan, provide written notice to contractor specifying the failure, and issue final decision for contractor to pay liquidated damages.

**[FAR 52.219-16]**

\*Provide a copy of the Diversity Plan to the Office of Small and Disadvantaged Business Utilization .

Review, negotiate and approve the Contractor's Diversity and Subcontracting Plans.  
**[DEAR 970.5226-1, FAR 52.219-9]**

Furnish to the contractor appropriate notices from the Office of Federal Contract Compliance Programs regional office that state the contractor's obligations and the rights of individuals with disabilities.  
**[FAR 22.1404, FAR 52.222-36]**

Advise affected labor unions that the Department of Labor will give them appropriate opportunity to present their views if a revision of a collective bargaining agreement is necessary.  
**[FAR 22.1405, 22.1305]**

Ensure small business plan requirements are appropriately flowed down and necessary reports are provided to the next higher tier, through the prime, to DOE, with the Small Business Specialist.  
**[FAR 52.219-9]**

Meet periodically with directors of contractor purchasing to review the status of the contractor's performance against its Small Business Subcontracting Plan as implemented by the clause and FAR Subpart 19.7 to ensure the maximum practicable utilization of small businesses in Government contracts, including the contractor's attainment of negotiated subcontracting goals. Encourage contractors to adapt the tools in paragraphs B, E, and F of Section I of Acquisition Letter 2000-02 and to take advantage of the tools in Section II of the Acquisition Letter: Provide a copy of the contractor's "Make or Buy" plan to the DOE Small Business Program Manager.  
Ensure that the contractor's purchasing system and methods provide for a special internal review of consolidated requirements where it is unlikely that small businesses will be able to compete.  
**[Acquisition Letter 2000-02]**

Submit copies of procurement request packages over \$3M to DOE Office of Economic Impact and Diversity.  
**[Acquisition Letter 2000-02]**

\* Participate with contracting officer representative and DOE Mentor-Protege Program Manager in reviewing semi-annual progress reports from the Mentor contractor.  
**[DEAR 919-7013(a)]**

\* Include results of the review of the semi-annual Mentor-Protege progress reports from the Mentor Contractor in the award fee evaluations of the affected contractor.  
**[DEAR 919-7013(b)]**



## **CONTRACTOR**

Develop a written affirmative action program for each establishment within 120 days from its first Government non-construction contract, subcontract or Government bill of lading.

**[FAR 22.804-1]**

Submit progress reports to the DOE Mentor-Protege Program Manager semi-annually.

**[DEAR 919-7013(c)]**

Establish procedures to ensure timely payment of amounts due subcontracts with small business concerns.

Ensure maximum practicable opportunity of small businesses to participate in performing Federal contracts.

Award subcontracts to the fullest extent consistent with efficient contract performance.

**[FAR 52.219-8]**

Attempt to meet or exceed the specified subcontracting goal.

**[FAR 52.219-10, FAR 52.219-26]**

Agrees that it does not and will not:

- Maintain or provide for its employees any segregated facilities, and
- Permit its employees to perform their services at any location under its control where segregated facilities are maintained; and

Include the clause in subcontracts subject to the "Equal Opportunity" clause.

**[FAR 52.222-21]**

Agrees to:

- Not discriminate against any employee or applicant for employment;
- Take affirmative action to ensure that applicants are employed and treated during employment without regard to their race, color religion, sex, or national origin;
- Post notices provided by the CO in conspicuous places available to employees and applicants;
- State in all solicitations or advertisements for employees that all qualified applicants will receive consideration for employment without regard to race color, religion, sex, or national origin;
- Advise labor union or workers' representative of Contractor commitments under this clause;
- Comply with EO 11246;
- Permit access to its premises, during normal business hours by the contracting agency or the Office of Federal Contract Compliance Programs; and
- Flow the clause to subcontract or purchase orders not exempted by the Secretary of Labor.

**[FAR 52.222-26]**

Flows the clause, and the Notice containing the goals for minority and female participation, to subcontractors at any tier for work involving any construction trade.

Take affirmative action to ensure equal employment opportunity based on procedures listed in FAR 52.222-27(g)(1) through (g)(16).

Designate a responsible official to monitor, submit reports, keep records.

**[FAR 52.222-27]**

Notify the Department of State when it has knowledge of any employee or potential employee being denied an entry visa to a country in which the contractor is required to perform the contract, and it believes the denial is attributable to race, color religion, sex, or national origin.

**[FAR 52.222-29]**

Comply with rules, regulations, and relevant orders of the Secretary of Labor issued under the Vietnam Era Veterans' Readjustment Assistance Act of 1972.

List all employment openings existing at contract award or occurring during contract performance, at an appropriate office of the State employment service system in the locality where the opening occurs.

**[FAR 52.222-35]**

Post employment notices stating the Contractor's obligation to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era, and the rights of applicants and employees.

Include the terms of this clause in every subcontract or purchase order of \$10,000 or more unless exempted.

**[FAR 52.222-35]**

Report annually in the first quarter of the calendar year on the:

- Number of disabled and the number of veterans from the Vietnam era in its workforce and
- The total number of new employees hired during the period covered by the report, and of that total, the number of disabled veterans, and the number of veterans of the Vietnam era.

Include the terms of the clause in every subcontract or purchase order of \$10,000 or more unless exempted.

**[FAR 52.222-37]**

Submit and negotiate, upon request by the Contracting Officer, a subcontracting plan, where applicable, that separately addresses subcontracting with small business, HUBZone small business concerns, small disadvantaged business, and women-owned small business concerns.

**[FAR 52.219-9]**

Submit goals or reports for measurement for subcontracting achievements to the CO.

**[FAR 52.219-9, DEAR 926-7006, DEAR 952.226-70, DEAR 952.226-72]**

Use best efforts to competitively award subcontracts to entities from the target groups under the Energy Policy Act of 1992.

**[DEAR 952.226-71]**

Submit as part of Subcontracting Plan goals for Energy Policy Act target groups.

**[DEAR 952.226-70]**

Submit a Diversity Plan after 90 days after contract award.

Submit an annual Diversity Plan update along with the annual fee proposal

**[DEAR 970.5226-1]**

Not discriminate against any employee or applicant because of physical or mental disability.

Agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified individuals with disabilities without discrimination based upon their physical or mental disability in all employment practices.

Agrees to post employment notices.

**[FAR 52.222-36]**

Notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the Contractor is bound by the terms of Section 503 of the Act and is committed to take affirmative action to employ, and advance in employment, qualified individuals with physical or mental disabilities.

Flow this affirmative action clause down to subcontractors.

**[FAR 52.222-36]**

Flow Subcontract Plan requirements to subcontractors and each qualifying lower tier subcontractor over \$500K.

**[FAR 52.219-9]**

Demonstrate good faith efforts to meet Subcontracting Plan goals and discuss with CO.

Pay the Government liquidated damages in an amount stated if the contracting officer decides that the contractor did not demonstrate good faith efforts to meet the Subcontracting Plan.

**[FAR 52.219-16]**

\*Include within the Diversity Plan the information which is delineated in the Reference Book for Contract Administrators.

Not enter into subcontracts of \$10 million or more without preaward equal opportunity clearance.

**[FAR 52.222-24]**

Obtain representations of small disadvantaged status from joint venture partners and teaming arrangement members through use of a provision substantially the same as paragraph (b)(1)(I) of the provision at FAR 52.219-22, "Small Disadvantaged Business Status."

**[FAR 52.219-25]**

Confirm that a joint venture partner, team member, or subcontractor representing itself as a small disadvantaged business concern, is identified as a certified small disadvantaged business in the database maintained by the Small Business Administration (PRO-Net) or by contacting the SBA's Office of Small Disadvantaged Business Certification and Eligibility.

Report on the participation of Small Disadvantaged Business concerns at contract completion, or as otherwise provided in this contract if the contract contains Small Disadvantaged Business participation targets.

**[FAR 52.219-25]**

Authorized to award subcontracts with a value of \$5 million or less for manufacturing standard industrial classifications and \$3 million or less for all other acquisitions on a noncompetitive basis to firms certified as participants by the Small Business Administration under its 8(a) program. Contractors may also set-aside for competition among 8(a) firms requirements in excess of those thresholds.

Authorized to set aside general construction requirements valued at \$3 million or less for small business on a class basis.

Authorized to use HUBZone set aside and HUBZone sole source procurement techniques in the award of subcontracts under conditions similar to those applicable to the award of Federal prime contracts.

Authorized to provide for an evaluation criterion that reflects a preference in the award of subcontracts to firms that propose to make significant use of small disadvantaged business or small woman-owned business in the performance of the proposed subcontract.

Authorized to set aside purchases valued up to \$100,000 for award to small businesses and to make purchases valued up to \$50,000 on a sole source basis to small businesses.

May enter into Mentor-Protege agreement with small businesses, small disadvantaged businesses, including 8(a) concerns, and woman-owned businesses to enhance the commercial viability of such businesses.

**[Acquisition Letter 2000-02]**

## **CONTRACTING OFFICER REPRESENTATIVE**

\* Receive, review, retain for monitoring purposes the contractor and subcontract annual plans for EEO, Affirmative Action, Diversity, and Small business goals to encourage the awardees to be compliant, and initiate action when non-compliance occurs.

\* Ensure that contractor non-compliance issues in performance areas of Equal Employment Opportunity, Affirmative Action, Diversity, and maximization of Small Business opportunities are considered relative to funds paid to the prime.

\* Participate with contracting officer and the DOE Mentor-Protege Program Manager in reviewing semi-annual progress reports from the Mentor contractor.

**[DEAR 919-70(a)]**

**WHERE CAN I GO FOR MORE DETAILED INFORMATION ON DIVERSITY, EQUAL EMPLOYMENT OPPORTUNITY, AND SMALL BUSINESS?**

**On Diversity**

1. DEAR 970.5226-1, "Diversity Plan"

**On Equal Opportunity and Affirmative Action**

2. FAR 22.8, "Equal Employment Opportunity"
3. FAR 22.9, "Nondiscrimination Because of Age"
4. FAR 22.13, "Disabled Veterans and Veterans of the Vietnam Era"
5. FAR 22.14, "Employment of Workers with Disabilities"
6. FAR 52.222-21, "Prohibition of Segregated Facilities"
7. FAR 52.222-22, "Previous Contracts and Compliance Reports"
8. FAR 52.222-23, "Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity for Construction"
9. FAR 52.222-25, "Affirmative Action Compliance"
10. FAR 52.222-24, "Preaward On-Site Equal Opportunity Compliance Evaluation"
11. FAR 52.222-26, "Equal Opportunity"
12. FAR 52.222-27, "Affirmative Action Compliance Requirements for Construction"
13. FAR 52.222-29, "Notification of Visa Denial"
14. FAR 52.222-35, "Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans"
15. FAR 52.222-36, "Affirmative Action for Workers with Disabilities"
16. FAR 52.222-37, "Employment Reports on Disabled Veterans and Veterans of the Vietnam Era"
17. DEAR 919.70, "Mentor-Protege Program"
18. DEAR 922.8, "Equal Employment Opportunity"

**On Small, Small Disadvantaged, HUBZone,  
and Women-Owned Business**

19. DEAR 926.70, "Implementation of Section 3021 of the Energy Policy Act of 1992"
20. DEAR 952.219-70, "DOE Mentor-Protege Program"
21. DEAR 952.226-70, "Subcontracting Goals under Section 3021 (A) of the Energy Policy Act of 1992"
22. DEAR 952.226-71, "Utilization of Energy Policy Act Target Entities"
23. DEAR 952.226-72, "Energy Policy Act Subcontracting Goals and Reporting Requirements"
24. DEAR 952.226-73, "Energy Policy Act Target Group Representation"
25. DEAR 970.19, "Small, Small Disadvantaged and Women-Owned Small Business Concerns"
26. DEAR 970.2670, "Implementation of section 3021 of the Energy Policy Act of 1992"
27. Acquisition Guide, Chapter 26, "Energy Policy Act Implementation"
28. Acquisition Letter 2000-02, "Small Business Programs"
29. FAR 19, "Small Business Programs"
30. FAR 52.219-8, "Utilization of Small Business Concerns"
31. FAR 52.219-9, "Small Business Subcontracting Plan"
32. FAR 52-219-10, "Incentive Subcontracting Program"
33. FAR 52.219-16, "Liquidated Damages-Subcontracting Program"
34. FAR 52.219-25, "Small Disadvantaged Business participation Program-Disadvantaged Status and Reporting"
35. FAR 52.219-26, "Small Disadvantaged Business Participation Program-Incentive Subcontracting"

**DO YOU HAVE ANY COMMENTS OR SUGGESTIONS FOR  
IMPROVING THIS CHAPTER OR THE BOOK? IF SO, PLEASE  
CONTACT US AT:**

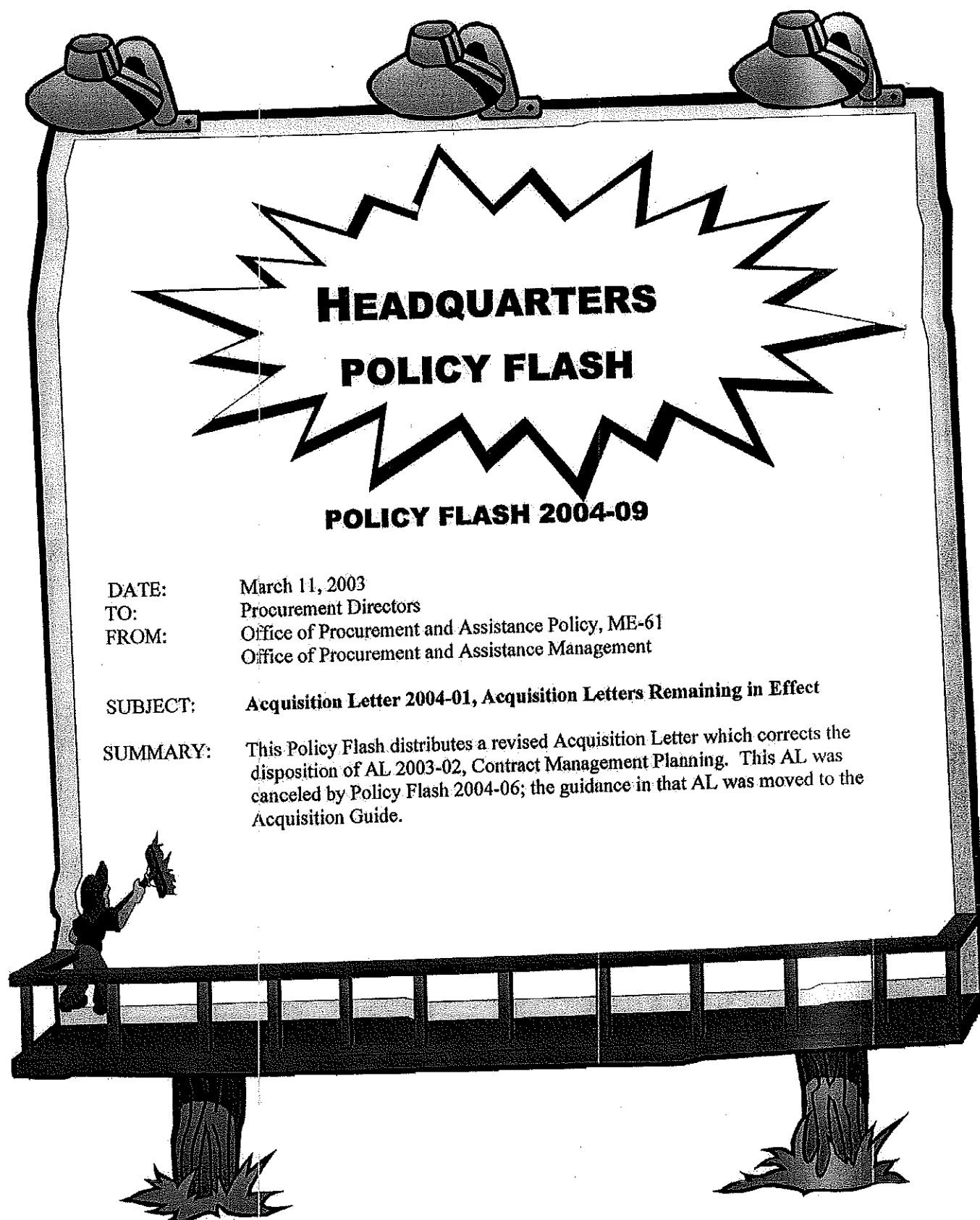
**editor@pr.doe.gov**

## **CHAPTER REVISIONS**

<b>Date</b>	<b>Subject of Revision</b>
April 4, 2003	<ol style="list-style-type: none"><li>1. Revised DEAR citations affected by DEAR 970 Rule (Dec. 2000)</li><li>2. Revised chapter to insert new language associated with Diversity Plans.</li><li>3. Deleted Acquisition Letters (AL) no longer in effect.</li></ol>



Mike F?



## **POLICY FLASH 2004-09**



**Michael Fischetti,  
Acting Director  
Office of Procurement and  
Assistance Policy, OMBE**

**Attachments**

**cc: PPAG Members**



## ACQUISITION LETTER

Acquisition Letters (AL) that remain in effect are identified below. All other previously issued ALs have been superseded by a formal rule-making, incorporated into other guidance, and/or canceled.

\* \* \* \* \*

### ACQUISITION LETTERS REMAINING IN EFFECT

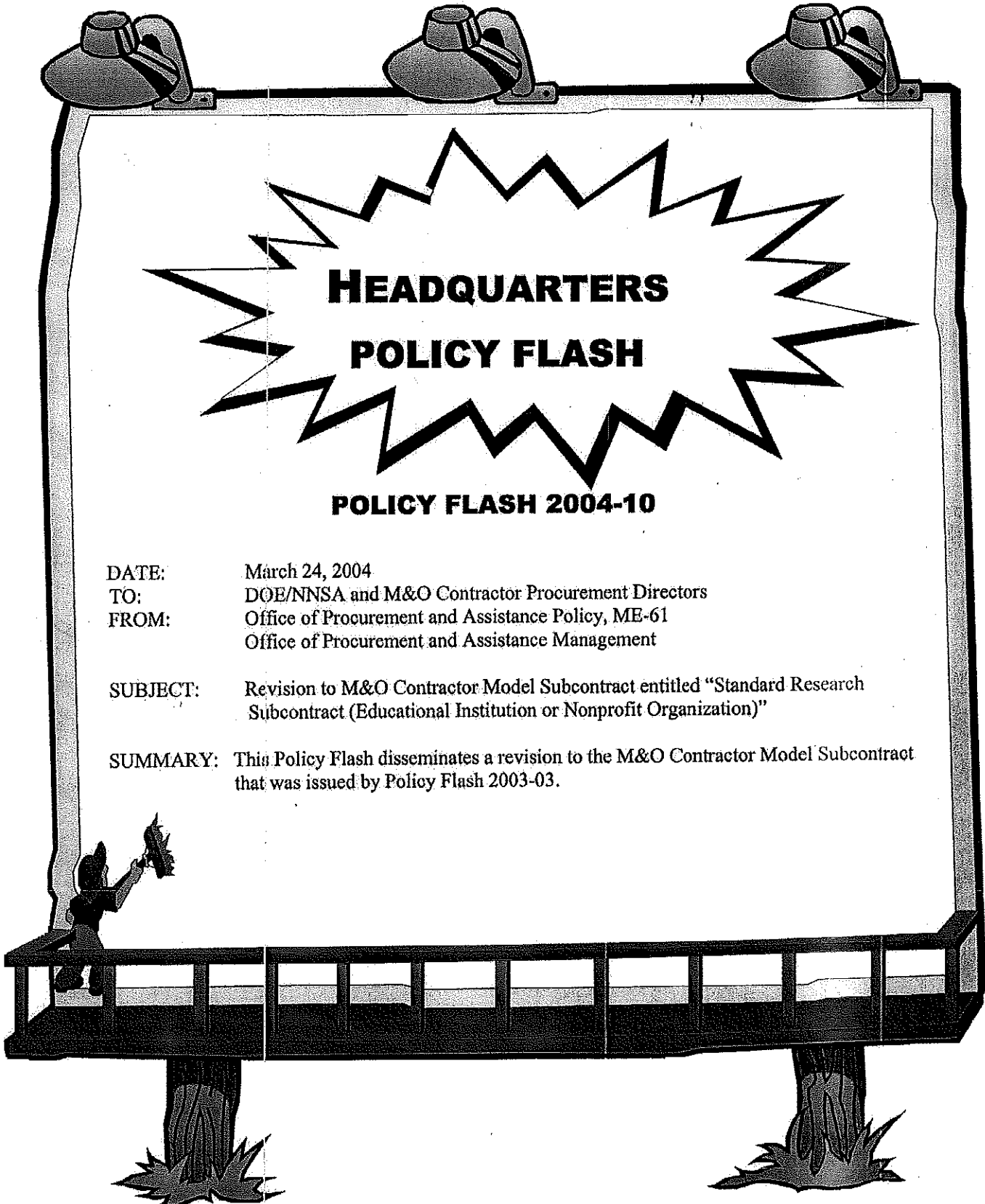
<u>NUMBER</u>	<u>DATE</u>	<u>SUBJECT</u>
93-4	04/07/93	Displaced Workers Benefits Program
94-19	12/09/94	Basic Labor Policies Fringe Benefits
95-06	06/28/95	Personal Property Letter System
95-14	11/17/95	Subcontracts under the New Independent States - Industrial Partnering Program
96-09	09/16/96	Full and Open Competition - Management and Operating Contracts
98-04	03/11/98	Diversity Plans
98-11	09/18/98	Waiver of Synopsis Requirements
99-04	06/23/99	Consortium Buying
99-06	08/27/99	DOE Authorized Subcontract for Use by DOE Management and Operating Contractors with New Independent States' Scientific Institutes
2000-02	04/20/00	Small Business Programs
2000-05	05/17/00	DOE Authorized Subcontract for Use by DOE Management and Operating (M&O) Contractors with New Independent States' Scientific Institutes through the Science and Technology Center in Ukraine
2000-08	08/18/00	Site Utilization and Management Planning
2000-09	11/11/00	Source Selection Authority
2000-10R	08/16/01	FAR Class Deviation Addressing Service Contract Act Requirements for Subcontracts for Certain Commercial Services
2001-03	05/25/01	Costs Associated with Whistleblower Actions
2001-04	08/22/01	Guidance on Electronic and Information Technology (EIT) Accessibility - Section 508 of Pub. L. 105-220, As Amended

<u>NUMBER</u>	<u>DATE</u>	<u>SUBJECT</u>
2001-05	10/12/01	Maximizing Opportunities for Small Business
2002-03	3/13/2002	Public Relations Requirements
2002-04	07/09/2002	Processing Requests for Indemnification or Other Extraordinary
2002-05	07/10/2002	Greening the Government Requirements in Contracting
2002-06	08/14/2002	Domestic and Foreign Procurement Preference Rules
2002-07	10/02/2002	Review of Management Contractors Purchasing Systems - Purchase Card Considerations
2002-08	12/02/2002	Project Labor Agreements
2003-04	08/25/2003	Value Engineering
2003-05	09/10/2003	Personal Property Management Career Development, Training and Certification Program
2004-02	03/02/2004	Implementation of FY 2004 Legislative Provisions

**ACQUISITION LETTERS DISCONTINUED**

<u>NUMBER</u>	<u>DATE</u>	<u>SUBJECT</u>
97-02	01/20/1997	M&O Legal Services Subcontracts
2000-12	12/15/2000	2000 Executive Compensation
2003-01	03/07/2003	Acquisition Letters Remaining in Effect
2003-02	03/07/2003	Contract Management Planning
2003-03	05/30/2003	Implementation of FY 2003 Legislative Provisions

*Trudy*



# **HEADQUARTERS POLICY FLASH**

## **POLICY FLASH 2004-10**

**DATE:** March 24, 2004  
**TO:** DOE/NNSA and M&O Contractor Procurement Directors  
**FROM:** Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

**SUBJECT:** Revision to M&O Contractor Model Subcontract entitled "Standard Research Subcontract (Educational Institution or Nonprofit Organization)"

**SUMMARY:** This Policy Flash disseminates a revision to the M&O Contractor Model Subcontract that was issued by Policy Flash 2003-03.

## **POLICY FLASH**

### **2004 - 10**

This Policy Flash disseminates an errata sheet, a strike and add version and a revised version of the M&O contractor model subcontract entitled, "Standard Research Subcontract (Educational Institution or Nonprofit Organization)" which was disseminated by Policy Flash 2003-03 on January 14, 2003. A word file of the revised subcontract is available on the DOE Professionals web site at <http://professionals.pr.doe.gov>. Click on "M&O Contractor Standard Research Subcontract" under the Procurement heading.

DOE/NNSA encourages M&O contractors to use this model subcontract for unclassified research and development work, not related to nuclear, chemical, biological, or radiological weapons of mass destruction or the production of special nuclear material. If the subcontract is for other than standard research and development work (e.g., work performed on a DOE/NNSA site, a programmatic requirement for open source software distribution, etc.), the articles and clauses in the model should be tailored to address these specific requirements.

We understand that some M&O contractors have developed automated systems that may not be able to handle the sequence of the standard subcontract without major reprogramming (e.g., signature page is at the end rather than at the beginning). It is not necessary to reprogram existing systems as long as the model text of the articles and clauses is used. You may also make minor changes or additions to the text (e.g., change "mailed" to "emailed" or "faxed," require payment by electronic funds transfer, require reports be submitted electronically, etc.) to reflect your business' processes.

We believe that the standardization of this research subcontract will greatly benefit the DOE complex and the university research community and request your support of its use.

If you have questions regarding this model subcontract, contact Trudy Wood at 202 586-5625 or by e-mail at [trudy.wood@hq.doe.gov](mailto:trudy.wood@hq.doe.gov).

Attachments



Michael Fischetti  
Acting Director  
Office of Procurement and  
Assistance Policy, OMBE

**STANDARD RESEARCH  
SUBCONTRACT (EDUCATIONAL  
INSTITUTION or NONPROFIT  
ORGANIZATION)**

**[FOR UNCLASSIFIED WORK]**

**NO.** \_\_\_\_\_

(DEPARTMENT OF ENERGY M&O CONTRACTOR)

NAME \_\_\_\_\_

ADDRESS \_\_\_\_\_

**Subcontractor:**

Attention: \_\_\_\_\_

Address \_\_\_\_\_

City, State, Zip \_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

E-Mail: \_\_\_\_\_

**Contractor's Procurement Representative  
[Contract Administrator]:**

Proc. Rep Title: \_\_\_\_\_

Phone #: ( \_\_\_\_\_ )

Fax #: ( \_\_\_\_\_ )

E-Mail: \_\_\_\_\_

**Introduction**

This is a cost-reimbursement, no-fee, standard subcontract for unclassified research and development work, not related to nuclear, chemical, biological, or radiological weapons of mass destruction or the production of special nuclear material. This Subcontract is between **[Insert contractor's name]**, (hereinafter "Contractor") and **[Insert subcontractor's name]** (hereinafter "Subcontractor"). The Subcontract is issued under Prime Contract No. **[Insert contract no.]** between the Contractor and the United States Department of Energy (hereinafter "DOE") **[include the following phrase in weapons lab contracts-- and the National Nuclear Security Administration (hereinafter "NNSA")]** for the management and operation of **[insert name of the DOE/NNSA facility]** (hereinafter "DOE [or NNSA] Facility").

**Agreement**

The parties agree to perform their respective obligations in accordance with the terms and conditions of the Schedule and the General Provisions and other documents attached or incorporated by reference, which together constitute the entire Subcontract and supercede all prior discussions, negotiations, representations, and agreements.

**[SUBCONTRACTOR NAME]**

**[M&O CONTRACTOR NAME]**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

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## SCHEDULE OF ARTICLES

### 1. Statement of Work

The Subcontractor shall perform certain research and development work identified as **[insert brief title or statement of research]** and more fully described in the *Statement of Work* Attachment to this Subcontract. **[or Appendix I.]**

The Subcontractor's Principal Investigator assigned to this work is **[insert Principal Investigator's name]**. The Principal Investigator shall not be replaced or reassigned without the advance written approval of the Contractor's Procurement Representative **[or Contract Administrator]**.

The Subcontractor shall submit three copies of the final and any intermediate reports to the Contractor's Procurement Representative **[or Contract Administrator, Contractor's Technical Representative, or named individual]** upon completion of the work and, when the Subcontract contains milestone requirements, on the indicated milestone dates. When requested by the Contractor's Technical Representative, the Subcontractor shall submit a draft copy of the final report for review prior to finalization. The Contractor's Technical Representative need not approve the Subcontractor's reported conclusions of the research.

### 2. Report Preparation Requirements

- a. These instructions apply to all formal reports, including the final report, required by the Subcontract. It does not apply to letter reports or reports specifically identified as Milestones in *Article 3. Period of Performance* in this Subcontract as informal reports.
- b. The final report shall contain a comprehensive summary of all work results and conclusions. All reports shall fairly and completely describe the efforts applied to and the results obtained toward achievement of objectives of the subcontract work. If an objective is not accomplished, such failure shall be fully documented and explained in the report.
- c. Reports shall include the following elements: (a) a brief abstract of the report which describes the overall objectives and results; (b) a full statement of each objective and description of the effort performed and the accomplishments achieved; (c) a list of any publication or information release made of material developed or maintained through the performance of the subcontract; and (d) any other relevant information.

### 3. Period of Performance

The work described in Article 1, Statement of Work, shall commence upon signature of this Subcontract by both parties and shall be completed on or before **(insert end date)**

**[OR, if there is a milestone schedule, add: in accordance with the following milestones:**

Milestone	Completion Date]
-----------	------------------

#### 4. Costs and Payments

- a. The estimated cost of the work called for in this Subcontract is \$ \_\_\_\_\_, and is based upon the following estimated levels of effort necessary to perform the Subcontract work:

Category	No. of Staff	No. of Months
----------	--------------	---------------

[OR:] is based on the Subcontractor's Cost Proposal Attachment [or Appendix II] to this Subcontract.

- b. [Check provision below that applies OR include only applicable provision]

\_\_\_\_\_ This Subcontract is fully-funded and is subject to the *Limitation of Costs* clause of the General Provisions.

\_\_\_\_\_ This Subcontract is incrementally funded and is subject to the *Limitation of Funds* clause of the General Provisions. The funding amount currently allotted to this Subcontract is \$ \_\_\_\_\_ and covers [describe what work the incremental funding covers.]

- c. The Contractor will pay the Subcontractor for performance of this Subcontract, unless excluded or limited by other provisions of this Subcontract, the allowable direct costs incident to performance, plus the allocable portion of the allowable indirect costs of the Subcontractor. Allowable and allocable costs shall be determined in accordance with the cost principles of the Allowable Cost and Payment clause of the General Provisions.

#### 5. Invoices for Payment

- a. Payments for Subcontract work shall be made monthly based on invoices submitted by the Subcontractor for work performed. Invoices shall bear the following certification signed by a responsible official of the Subcontractor:

"The undersigned certifies that the information set forth herein is true and correct and may be used as a basis for payment for work."

- b. Invoices must identify the subcontract number, the period covered, and the total expenditures claimed for each of the following categories: salaries, fringe benefits, travel, materials and supplies, equipment, subcontracts/consultants, other direct costs such as rent, when applicable, and indirect or Facility and Administration costs.
- c. Invoices shall be mailed to: (Insert address)
- d. Payments shall be mailed to: (Insert address)
-

- e. The Contractor will use its best efforts to process invoices for payment within 30 days of receipt; provided, however, that payments made more than 30 days after receipt of an invoice shall not be subject to penalty, interest, or late charges.
- f. Invoices, which include the cost of property acquired by the Subcontractor at a cost of \$5,000 or more, shall include a description of the property and shall identify the assigned property number; the manufacturer; the Serial number and model number; the acquisition date; the unit price, quantity, and total cost of the property; and the location of the property.

## 6. Contractor-Furnished and Subcontract-Acquired Property

- a. The Contractor shall furnish the Subcontractor the materials, equipment, and supplies listed in *Contractor-Furnished Government Property* [OR Appendix III] to this Subcontract.
- b. Purchase of equipment or other tangible personal property, which is not identified in the Subcontractor's cost proposal for this Subcontract and for which the Subcontractor is entitled to be reimbursed as a direct item of cost under this Subcontract, shall be approved in advance by the Contractor's Procurement Representative [OR Contract Administrator].
- c. All property furnished by the Contractor or acquired by the Subcontractor, as a direct cost under the Subcontract, title to which vests in the Government, shall be identified, controlled, and protected as required by the *Government Property* clause of the General Provisions of this Subcontract. Disposition of such property upon completion of this Subcontract shall be as directed by the Contractor's Procurement Representative [OR Contract Administrator].
- d. Title to all high-risk property, regardless of dollar value, vests in the Government. The Subcontractor shall ensure that adequate safeguards are in place, and adhered to, for the handling, control and disposition of high-risk property in accordance with the policies, practices and procedures for property management contained in the DOE Property Management regulations (41 CFR 109-1.53)

High-risk property is defined in 41 CFR 109-1.100-51, and includes proliferation sensitive, nuclear related dual use, export controlled, chemically or radioactively contaminated, hazardous, and specially designed and prepared property, including property on the militarily critical technologies list. The loss, destruction, damage to, or the unintended or premature transfer of such property could pose risks to the public, the environment, or the national security interests of the United States.

## 7. Subcontract Administration

- a. The Contractor's Procurement Representative [OR Contract Administrator] for this Subcontract is [insert name of PR/CA]. The Procurement Representative [OR Contract
-

Administrator] is the only person authorized to make changes in the requirements of this Subcontract or make modifications to this Subcontract, including changes or modifications to the Statement of Work and the Schedule. The Subcontractor shall direct all notices and requests for approval required by this Subcontract to the Procurement Representative [OR Contract Administrator] at the following address:

**[Insert address]**

Any notices and approvals required by this Subcontract from the Contractor to the Subcontractor shall be issued by the Procurement Representative [OR Contract Administrator].

- b. The Contractor's Technical Representative for this Subcontract is [insert name]. The Technical Representative is the person designated to monitor the Subcontract work and to interpret and clarify the technical requirements of the *Statement of Work*. The Technical Representative is not authorized to make changes to the work or modify this Subcontract.

## **8. Travel Requirements**

- a. All travel not included in the Subcontractor's cost proposal must be approved in advance by the Contractor.
- b. All foreign travel must be approved in advance by the Contractor, even if the cost is included in the Subcontractor's cost proposal for this Subcontract.

## **9. Performance of Work**

The Subcontractor will perform the work at a location other than a DOE/NNSA Facility.

## **10. Incorporated Documents**

The following documents are hereby incorporated as Attachments [OR Appendices] to the Schedule of Articles of this Subcontract:

General Provisions for Standard Research Subcontracts, dated \_\_\_\_\_  
Statement of Work dated \_\_\_\_\_ [OR Appendix I]  
Subcontractor's Cost Proposal dated \_\_\_\_\_ (if applicable) [OR Appendix II]  
Contractor-Furnished Government Property dated \_\_\_\_\_ [OR Appendix III]  
[List others if applicable.]

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## GENERAL PROVISIONS

### CLAUSE 1 - PUBLICATIONS

- A. The Subcontractor shall closely coordinate with the Contractor's Technical Representative regarding any proposed scientific, technical or professional publication of the results of the work performed or any data developed under this Subcontract. The Subcontractor shall provide the Contractor an opportunity to review any proposed manuscripts describing, in whole or in part, the results of the work performed or any data developed under this Subcontract at least forty-five (45) days prior to their submission for publication. The Contractor will review the proposed publication and provide comments. A response shall be provided to the Subcontractor within forty-five (45) days; otherwise, the Subcontractor may assume that the Contractor has no comments. Subject to the requirements of Clause 9, the Subcontractor agrees to address any concerns or issues identified by the Contractor prior to submission for publication.
- B. Subcontractor may acknowledge the Contractor and Government sponsorship of the work as appropriate.

### CLAUSE 2 - NOTICES

- A. The Subcontractor shall immediately notify the Contractor's Procurement Representative [OR Contract Administrator] in writing of: (1) any action, including any proceeding before an administrative agency, filed against the Subcontractor arising out of the performance of this Subcontract; and (2) any claim against the Subcontractor, the cost and expense of which is allowable under the terms of this Subcontract.
- B. If, at any time during the performance of this Subcontract, the Subcontractor becomes aware of any circumstances which may jeopardize its performance of all or any portion of the Subcontract, it shall immediately notify the Contractor's Procurement Representative [OR Contract Administrator] in writing of such circumstances, and the Subcontractor shall take whatever action is necessary to cure such defect within the shortest possible time.

### CLAUSE 3 - ASSIGNMENTS

The Contractor may assign this Subcontract to the Government or its designee(s). Except as to assignment of payment due, the Subcontractor shall have no right to assign or mortgage this Subcontract or any part of it without the prior written approval of the Contractor's Procurement Representative [OR Contract Administrator], except for subcontracts already identified in the Subcontractor's proposal.

### CLAUSE 4 - DISPUTES

- A. Informal Resolution
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1. The parties to a dispute shall attempt to resolve it in good faith, by direct, informal negotiations. All negotiations shall be confidential. Pending resolution of the dispute, the Subcontractor shall proceed diligently with the performance of this Subcontract, in accordance with its terms and conditions.
2. The parties, upon mutual agreement, may seek the assistance of a neutral third party at any time, but they must seek such assistance no later than 120 days after the date of the Contractor's receipt of a claim. The requirement to seek the assistance of a neutral third party may be waived or modified only with the consent of all parties. The parties may request the assistance of an established Ombuds Program, where available, or hire a mutually agreeable mediator, or ask the DOE Office of Dispute Resolution to assist them in selecting a mutually agreeable mediator. The cost of mediation shall be shared equally by both parties. If requested by both parties, the neutral third party may offer a non-binding opinion as to a possible settlement. All discussions with the neutral third party shall be confidential.
3. In the event the parties are unable to resolve the dispute by using a neutral third party or waive the requirement to seek such assistance, the Contractor will issue a written decision on the claim.

#### B. Formal Resolution

1. If a dispute has not been resolved by informal resolution, it may be submitted to binding arbitration upon agreement of both parties, by and in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA). If arbitration is agreed to by both parties, such decision is irrevocable and the outcome of the arbitration shall be binding on all parties.
2. Each party to the arbitration shall pay its pro rata share of the arbitration fees, not including counsel fees or witness fees or other expenses incurred by the party for its own benefit.
3. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction.

#### C. Litigation

If arbitration is declined for such disputes, the parties may pursue litigation in any court of competent jurisdiction.

#### D. Governing Law

This Subcontract shall be interpreted and governed in accordance with all applicable federal and state

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laws and all applicable federal rules and regulations.

**CLAUSE 5 - RESPONSIBILITY FOR TECHNOLOGY EXPORT CONTROL**

The parties understand that materials and information resulting from the performance of this Subcontract may be subject to export control laws and that each party is responsible for its own compliance with such laws.

**CLAUSE 6 - COST ACCOUNTING STANDARDS (CAS) LIABILITY**

**[Applicable to Subcontracts exceeding \$500,000]**

Clause 10 below incorporates into these GENERAL PROVISIONS clauses entitled, "*COST ACCOUNTING STANDARDS*" and "*ADMINISTRATION OF COST ACCOUNTING STANDARDS*." Notwithstanding the provisions of these clauses, or of any other provision of the Subcontract, the Subcontractor shall be liable to the Government for any increased costs, or interest thereon, resulting from any failure of the Subcontractor, with respect to activities carried on at the site of the work, or of a subcontractor, to comply with applicable cost accounting standards or to follow any practices disclosed pursuant to the requirements of such clause.

**CLAUSE 7 - DISCLOSURE AND USE RESTRICTIONS FOR LIMITED RIGHTS DATA**

Generally, delivery of Limited Rights Data (or Restricted Computer Software) should not be necessary. However, only if Limited Rights Data will be used in meeting the delivery requirements of the subcontract, the following disclosure and use restrictions shall apply to and shall be inserted in, any FAR 52.227-14 Limited Rights Notice on any Limited Rights Data furnished or delivered by the Subcontractor or a lower-tier subcontractor:

- A. These "Limited Rights Data" may be disclosed for evaluation purposes under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed;
  - B. These "Limited Rights Data" may be disclosed to other contractors participating in the Government's program of which this Subcontract is a part for information or use in connection with the work performed under their contracts and under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed; and
  - C. These "Limited Rights Data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "Limited Rights Data" be retained in confidence and not be further disclosed.
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## **CLAUSE 8 - ORDER OF PRECEDENCE**

Any inconsistencies in the documents comprising this Subcontract shall be resolved by giving precedence in the following order: (a) the SCHEDULE OF ARTICLES and this Subcontract Signature Page; (b) these GENERAL PROVISIONS; (c) other referenced documents, exhibits, and attachments; and (d) any referenced specification or *Statement of Work*.

## **CLAUSE 9 – SECURITY REQUIREMENTS**

- A. This Subcontract is intended for unclassified, publicly releasable research or development work. The Contractor does not expect that results of the research project will involve classified information or Unclassified Controlled Nuclear Information (UCNI) (See 10 CFR part 1017). However, the Contractor may review the research work generated under this Subcontract at any time to determine if it requires classification or control as UCNI.
  - B. If, subsequent to the date of this Subcontract, a review of the information reveals that classified information or UCNI is being generated under this Subcontract, then the security requirements of this Subcontract must be changed. If such changes cause an increase or decrease in costs or otherwise affect any other term or condition of this Subcontract, the Subcontract shall be subject to an equitable adjustment as if the changes were directed under the Changes clause of this Subcontract.
  - C. If the security requirements are changed, the Subcontractor shall exert every reasonable effort compatible with its established policies to continue the performance of work under the Subcontract in compliance with the change in the security requirements. If the Subcontractor determines that continuation of the work under this Subcontract is not practicable because of the change in security requirements, the Subcontractor shall notify the Contractor's Procurement Representative in writing. Until the Contractor's Procurement Representative provides direction, the Subcontractor shall protect the material as directed by the Contractor.
  - D. After receiving the written notification, the Contractor's Procurement Representative shall explore the circumstances surrounding the proposed change in security requirements and shall endeavor to work out a mutually satisfactory method to allow the Subcontractor to continue performance of work under this Subcontract.
  - E. Within 15 days of receiving the written notification of the Subcontractor's stated inability to proceed, the Contractor's Procurement Representative must determine whether (1) these security requirements do not apply to this contract or (2) a mutually satisfactory method for continuing performance of work under this Subcontract can be agreed upon. If this determination is not made, the Subcontractor may request the Contractor's Procurement Representative to terminate the Subcontract in whole or in part. The Contractor's Procurement Representative shall terminate the Subcontract in whole or in part, as may be appropriate, and the termination shall be deemed a termination under the terms of the Termination for the Convenience of the Government clause.
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**CLAUSE 10 - CLAUSES INCORPORATED BY REFERENCE**

The FEDERAL ACQUISITION REGULATION (FAR) and the U.S. DEPARTMENT OF ENERGY ACQUISITION REGULATION (DEAR) clauses listed below, which are located in Chapters 1 and 9, respectively, of Title 48 of the Code of Federal Regulations, are incorporated by this reference as a part of these GENERAL PROVISIONS with the same force and effect as if they were given in full text, as prescribed below.

The full text of the clauses may be accessed electronically at <http://www.arnet.gov/far/> (FAR) and <http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+Regulation> (DEAR).

As used in the clauses, the term "contract" shall mean this Subcontract; the term "Contractor" shall mean the Subcontractor; the term "subcontractor" shall mean the Subcontractor's subcontractor, and the terms "Government" and "Contracting Officer" shall mean the Contractor, except in FAR clause 52.227-14, and DEAR clauses 970.5227-4, 952.227-11, 970.5232-3 and 52.245-5 Alternate I, in which clauses "Government" shall mean the United States Government and "Contracting Officer" shall mean the DOE/NNSA Contracting Officer for Prime Contract DE-\_\_\_\_\_ with the Contractor. As used in DEAR clauses 952.204-72 and 952.227-9, the term "DOE" shall mean DOE/NNSA or the Contractor.

The modifications of these clause terms are intended to appropriately identify the parties and establish their contractual and administrative reporting relationship, and shall not apply to the extent they would affect the U.S. Government's rights. The Subcontractor shall include the listed clauses in its subcontracts at any tier, to the extent applicable.

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**APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW:**

DEAR 952.204-71	SENSITIVE FOREIGN NATIONS CONTROLS (APR 1994). Applies if the Subcontract is for unclassified research involving nuclear technology.
FAR 52.216-7	ALLOWABLE COST AND PAYMENT (DEC 2002). Substitute 31.3 in subcontracts with educational institutions and 31.7 in subcontracts with nonprofit organizations for 31.2 in paragraph (a).
FAR 52.216-15	PREDETERMINED INDIRECT COSTS RATES APR 1998).
FAR 52.222-21	PROHIBITION OF SEGREGATED FACILITIES (FEB 1999).
FAR 52.222-26	EQUAL OPPORTUNITY (APR 2002).
FAR 52.223-3	HAZARDOUS MATERIAL IDENTIFICATION AND MATERIAL SAFETY DATA SHEETS (JAN 1997) AND ALTERNATE I. Applies only if Subcontract involves delivery of hazardous materials.
FAR 52.225-13	RESTRICTIONS ON CERTAIN FOREIGN PURCHASES (JAN 2004).
DEAR 970.5227-4	AUTHORIZATION AND CONSENT (AUG 2002), Paragraph (a).
DEAR 952.227-9	REFUND OF ROYALTIES (MAR 1995). Applies if "royalties" of more than \$250 are paid by a subcontractor at any tier.
DEAR 952.227-11	PATENT RIGHTS - RETENTION BY THE CONTRACTOR (SHORT FORM) (FEB 1995). (Applies only if Subcontractor is a nonprofit organization as set forth in 48 CFR 27.301. If Subcontractor does not qualify in accordance with 48 CFR 27.301, it may request a patent waiver pursuant to 10 CFR 784.)
FAR 52.227-14	[Check provision below that applies OR include only applicable provision]. ____ RIGHTS IN DATA-GENERAL (JUN 1987) with ALTERNATE V and DEAR 927.409 Paragraphs (a) and (d)(3). Applies if the Subcontract is for development work, or for basic and applied research where computer software is specified as a Deliverable in the Statement of Work or other special circumstances apply as specified in the agreement. ____ RIGHTS IN DATA-GENERAL (JUN 1987) with ALTERNATE IV, subparagraph (c)(1) and DEAR 927.409, subparagraph (a) Definitions. Applies if the Subcontract is for basic or applied research and computer software is not specified as a Deliverable in the Statement of Work, and no other special circumstances apply per DEAR 927.409.
FAR 52.227-23	RIGHTS TO PROPOSAL DATA (TECHNICAL) (JUNE 1987). Applies if the Subcontract is based upon a technical proposal.
FAR 52.229-10	STATE OF NEW MEXICO GROSS RECEIPTS AND COMPENSATING TAX (APR 2003). Applies if any part of this Subcontract is to be performed in the State of New Mexico.
FAR 52.232-20	LIMITATION OF COST (APR 1984). Applies if the Subcontract is fully funded.
FAR 52.232-22	LIMITATION OF FUNDS (APR 1984). Applies if the Subcontract is incrementally funded.

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FAR 52.242-15	STOP-WORK ORDER (AUG 1989) with ALTERNATE I (APR 1984).
FAR 52.243-2	CHANGES – COST-REIMBURSEMENT (AUG 1987), WITH ALTERNATE V
FAR 52.244-2	SUBCONTRACTS (AUG 1998) with ALTERNATE II. Insert in Paragraph (e): “Any subcontract or purchase order for other than “commercial items” exceeding the simplified acquisition threshold. (“Commercial item” has the meaning contained in FAR 52.202-1, Definitions.)”
FAR 52.245-5	GOVERNMENT PROPERTY (COST-REIMBURSEMENT, TIME-AND-MATERIALS, OR LABOR-HOUR CONTRACTS (JUNE 2003) with Alternate I. Paragraphs (e)(1) and (e)(2) insert, “and DOE Acquisition Regulations Subpart 945.5,” after the reference to FAR Subpart 45.5).
FAR 52.246-9	INSPECTION OF RESEARCH AND DEVELOPMENT (SHORT FORM) (APR 1984).
FAR 52.247-63	PREFERENCE FOR U. S. FLAG AIR CARRIERS (JUNE 2003). Applies if the Subcontract involves international air transportation.
FAR 52.247-64	PREFERENCE FOR PRIVATELY OWNED U.S.-FLAG COMMERCIAL VESSELS (APR 2003).
DEAR 952.247-70	FOREIGN TRAVEL (DEC 2000).
FAR 52.249-5	TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (EDUCATIONAL AND OTHER NONPROFIT INSTITUTIONS) (SEP 1996).
DEAR 952.217-70	ACQUISITION OF REAL PROPERTY (APR 1984). Applies if the Subcontract involves leased space that is reimbursed.
DEAR 970.5232-3	ACCOUNTS, RECORDS, AND INSPECTION (DEC 2000)

**APPLICABLE IF THE SUBCONTRACT IS FOR \$10,000 OR MORE:**

FAR 52.222-35	EQUAL OPPORTUNITY FOR SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA AND OTHER ELIGIBLE VETERANS (DEC 2001).
FAR 52.222-36	AFFIRMATIVE ACTION FOR WORKERS WITH DISABILITIES (JUNE 1998).
FAR 52.222-37	EMPLOYMENT REPORTS ON SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA AND OTHER ELIGIBLE VETERANS (DEC 2001).

**APPLICABLE IF THE SUBCONTRACT EXCEEDS \$100,000:**

FAR 52.203-5	COVENANT AGAINST CONTINGENT FEES (APR 1984)
FAR 52.203-6	RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT (JULY 1995).
FAR 52.203-7	ANTI-KICKBACK PROCEDURES (JULY 1995), excluding Paragraph (c)(1).

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FAR 52.203-10 PRICE OR FEE ADJUSTMENT FOR ILLEGAL OR IMPROPER ACTIVITY (JAN 1997).  
FAR 52.203-12 LIMITATION ON PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS (JUNE 2003).  
FAR 52.219-8 UTILIZATION OF SMALL BUSINESS CONCERNS (OCT 2000).  
FAR 52.222-04 CONTRACT WORK HOURS AND SAFETY STANDARDS ACT - OVERTIME COMPENSATION (SEP 2000).  
DEAR 970.5227-5 NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT (AUG 2002).

**APPLICABLE IF THE SUBCONTRACT EXCEEDS \$500,000:**

FAR 52.215-10 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (OCT 1997) if subcontract exceeds \$550,000.  
FAR 52.215-11 PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA-MODIFICATIONS (OCT 1997) not used when 52.215-10 is included. In subcontracts greater than \$550,000.  
FAR 52.215-12 SUBCONTRACTOR COST OR PRICING DATA (OCT 1997). Applies if 52.215-10 applies.  
FAR 52.215-13 SUBCONTRACTOR COST OR PRICING DATA-MODIFICATIONS (OCT 1997). Applies if 52.215-11 applies.  
FAR 52.219-9 SMALL BUSINESS SUBCONTRACTING PLAN (JAN 2002). Applies unless there are no subcontracting possibilities.  
FAR 52.227-16 ADDITIONAL DATA REQUIREMENTS (JUNE 1987).  
FAR 52.230-2 COST ACCOUNTING STANDARDS (APR 1998), excluding paragraph (b). Applies to nonprofit organizations if they are subject to full CAS coverage as set forth in 48 CFR Chapter 99, Subpart 9903.201-2 (FAR Appendix B).  
FAR 52.230-3 DISCLOSURE AND CONSISTENCY OF COST ACCOUNTING PRACTICES (APR 1998), excluding paragraph (b). Applies to nonprofit organizations if they are subject to modified CAS coverage as set forth in 48 CFR Chapter 99, Subpart 9903.201-2 (FAR Appendix B).  
FAR 52.230-5 COST ACCOUNTING STANDARDS – EDUCATIONAL INSTITUTION (APR 1998), excluding paragraph (b).  
FAR 52.230-6 ADMINISTRATION OF COST ACCOUNTING STANDARDS (NOV 1999).

(END OF GENERAL PROVISIONS)

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March 2004

**ERRATA SHEET**  
**STANDARD RESEARCH SUBCONTRACT (EDUCATIONAL INSTITUTION**  
**OR NONPROFIT ORGANIZATION)**

**Page 1, Paragraph 1:** Revise to read: "This is a cost-reimbursement, no-fee, standard subcontract for unclassified research and development work, not related to nuclear, chemical, biological, or radiological weapons of mass destruction or the production of special nuclear material. This Subcontract is between **[Insert contractor's name]**, hereinafter "Contractor") and **[Insert subcontractor's name]** (hereinafter "Subcontractor"). The Subcontract is issued under Prime Contract No. **[insert contract number]** between the Contractor and the United States Department of Energy (hereinafter "DOE") **[include the following phrase in weapons laboratory contracts – and the National Nuclear Security Administration (hereinafter "NNSA")]** for the management and operation of **[insert name of the DOE/NNSA facility]** (hereinafter "DOE [or NNSA] Facility").

**SCHEDULE OF ARTICLES**

**Article 4. Costs and Payments**, paragraph c, last sentence: Delete everything after "General Provisions."

**Article 5. Invoices for Payment:**

1. In paragraph a, last sentence, insert a period and quotation marks at the end of the sentence.
2. Add a new paragraph b to read as follows: "Invoices must identify the subcontract number, the period covered, and the total expenditures claimed for each of the following categories: salaries, fringe benefits, travel, materials and supplies, equipment, subcontracts/consultants, other direct costs such as rent, when applicable, and indirect or Facility and Administration costs."
3. Change the identifiers for paragraphs "b", "c", "d", and "e" to read "c", "d", "e", and "f," respectively.

**Article 6. Contractor-Furnished and Subcontract-Acquired Property**, paragraph b: Change the words "approved budget" to the words "cost proposal."

**Article 6. Contractor-Furnished and Subcontract-Acquired Property**, paragraph d:

1. In the first paragraph, change "(41 CFR 101-1.53)" to "(41 CFR 109-1.53)".
2. In the second paragraph, delete the first sentence and revise the second sentence as follows:
  - Change the word "as" to the word "is."
  - Change "41 CFR 1.100-51" to "41 CFR 109-1.100.51."
  - Add the word "and" after "41 CFR 109-1.100.51."
3. Add the following sentence to the end of the second paragraph: "The loss, destruction, damage to, or the unintended or premature transfer of such property could pose risks to the public, the environment, or the national security interests of

the United States.”

**Article 8. Travel Requirements**, paragraphs a and b: Change the words “approved budget” to the words “cost proposal.”

**Article 9. Performance of Work:** Change the words “the DOE” to the words “a DOE/NNSA”.

#### **GENERAL PROVISIONS**

**CLAUSE 1 – PUBLICATIONS**, paragraph A:

1. In the first sentence, change the words “related to” to the word “of.”
2. In the second sentence, change “thirty (30)” to “forty five (45).”
3. Revise the last two sentences to read: “The Contractor will review the proposed publication and provide comments. A response shall be provided to the Subcontractor within forty five (45) days; otherwise, the Subcontractor may assume that the Contractor has no comments. Subject to the requirements of Clause 9, the Subcontractor agrees to address any concerns or issues identified by the Contractor prior to submission for publication.”

**CLAUSE 3 – ASSIGNMENTS:** Change the words “approved budget” to the words “Subcontractor’s proposal.”

**CLAUSE 6 – COST ACCOUNTING STANDARDS (CAS) LIABILITY:**

1. In the parenthesis, change “\$550,000” to “\$500,000”.
2. Revise the first sentence to read: “Clause 10 below incorporates into these GENERAL PROVISIONS clauses entitled, “COST ACCOUNTING STANDARDS” and “ADMINISTRATION OF COST ACCOUNTING STANDARDS.”
3. In the second sentence, change the words “that clause” to the words “these clauses.”

**CLAUSE 7 – DISCLOSURE AND USE RESTRICTIONS FOR LIMITED RIGHTS DATA:**

1. In the first paragraph, last sentence, delete everything after “lower-tier subcontractor.”
2. In paragraphs A., B., and C. change the first word to “These”.

Add a new **CLAUSE 9 – SECURITY REQUIREMENTS** and change the number of the current **CLAUSE 9 – CLAUSES INCORPORATED BY REFERENCE** to **CLAUSE 10**. The new Clause 9 reads as follows:

#### **CLAUSE 9 – SECURITY REQUIREMENTS**

- A. This Subcontract is intended for unclassified, publicly releasable research or development work. The Contractor does not expect that results of the research project will involve classified information or Unclassified Controlled Nuclear Information (UCNI) (See 10 CFR part 1017). However, the Contractor may review the research work generated under this Subcontract at any time to determine if it requires classification or control as UCNI.

- B. If, subsequent to the date of this Subcontract, a review of the information reveals that classified information or UCNi is being generated under this Subcontract, then the security requirements of this Subcontract must be changed. If such changes cause an increase or decrease in costs or otherwise affect any other term or condition of this Subcontract, the Subcontract shall be subject to an equitable adjustment as if the changes were directed under the Changes clause of this Subcontract.
- C. If the security requirements are changed, the Subcontractor shall exert every reasonable effort compatible with its established policies to continue the performance of work under the Subcontract in compliance with the change in the security requirements. If the Subcontractor determines that continuation of the work under this Subcontract is not practicable because of the change in security requirements, the Subcontractor shall notify the Contractor's Procurement Representative in writing. Until the Contractor's Procurement Representative provides direction, the Subcontractor shall protect the material as directed by the Contractor.
- D. After receiving the written notification, the Contractor's Procurement Representative shall explore the circumstances surrounding the proposed change in security requirements and shall endeavor to work out a mutually satisfactory method to allow the Subcontractor to continue performance of work under this Subcontract.
- E. Within 15 days of receiving the written notification of the Subcontractor's stated inability to proceed, the Contractor's Procurement Representative must determine whether (1) these security requirements do not apply to this contract or (2) a mutually satisfactory method for continuing performance of work under this Subcontract can be agreed upon. If this determination is not made, the Subcontractor may request the Contractor's Procurement Representative to terminate the Subcontract in whole or in part. The Contractor's Procurement Representative shall terminate the Subcontract in whole or in part, as may be appropriate, and the termination shall be deemed a termination under the terms of the Termination for the Convenience of the Government clause.

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE**, paragraph 3: In the first sentence:

1. Change the words "FAR clauses" to "FAR clause."
2. Delete "52.227-1 Alternate 1, and."
3. Insert "970.5227-4" after "DEAR clauses."
4. Change "52.245-05" to "52.245-5."

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW**, DEAR 952.204-71 SENSITIVE FOREIGN NATIONS CONTRAOLS: Change "OCT 1997" to "APR 1994."

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW:**

Delete the following clause: DEAR 952.204-72 DISCLOSURE OF INFORMATION.

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW, FAR 52.216-7 ALLOWABLE COST AND PAYMENT:**

1. Change “APR 1998” to “DEC 2002.”
2. Revise to read: “Substitute 31.3 in subcontracts with educational institutions and 31.7 in subcontracts with nonprofit organizations for 31.2 in paragraph (a).”

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW, FAR 52.226-26 EQUAL OPPORTUNITY:** Change “FEB 1999” to “APR 2002.”

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW, FAR 52.227-14 RIGHTS IN DATA—GENERAL:** Revise the first and second paragraphs as follows:

1. Add (JUN 1987) after RIGHTS IN DATA.
2. Delete the word “Scope” and insert the word “Statement” therefore.

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW, FAR 52.229-10 STATE OF NEW MEXICO GROSS RECEIPTS AND COMPENSATING TAX:** Change “OCT 1988” to “APR 2003.”

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW:**

Insert a new item “FAR 52.243-2 CHANGES – COST-REIMBURSEMENT (AUG 1987), WITH ALTERNATE V.”

NOTE: move this to proper numeric place so that sequential type numbering in model is maintained.

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW, FAR 52.244-6 SUBCONTRACTS:** Revise the FAR cite to read “FAR 52.244-2” and add “(“Commercial item” has the meaning contained in FAR 52.202-1, Definitions.).”

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW, FAR 52.245-5 GOVERNMENT PROPERTY (COST-REIMBURSEMENT, TIME-AND-MATERIALS, OR LABOR-HOUR CONTRACTS:** Change “JAN 1986” to “JUNE 2003.”



**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW, FAR 52.247-63 PREFERENCE FOR U.S. FLAG AIR CARRIERS:** Change “JAN 1997” to “JUNE 2003.”

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW, FAR 52.247-64 PREFERENCE FOR PRIVATELY OWNED U.S.-FLAG COMMERCIAL VESSELS:** Change “JUNE 2000” to “APR 2003.”

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE IF THE SUBCONTRACT EXCEEDS \$2,500, FAR 52.225-13 RESTRICTIONS ON CERTAIN FOREIGN PURCHASES:**

1. Move this clause to the proper numeric place in the section entitled “CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW.”
2. Change “FEB 2000” to “JAN 2004.”

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE IF THE SUBCONTRACT IS FOR \$10,000 OR MORE, FAR 52.222-35:** Change the title of the clause and date to read: EQUAL OPPORTUNITY FOR SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA AND OTHER ELIGIBLE VETERANS (DEC 2001).

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE IF THE SUBCONTRACT IS FOR \$10,000 OR MORE, FAR 52.222-37:** Change the title of the clause and date to read: EMPLOYMENT REPORTS ON SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA AND OTHER ELIGIBLE VETERANS (DEC 2001).

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE IF THE SUBCONTRACT EXCEEDS \$100,000:** Insert a new item “FAR 52.203-5 COVENANT AGAINST CONTINGENT FEES (APR 1984).”

NOTE: move this to proper numeric place so that sequential type numbering in model is maintained.

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE IF THE SUBCONTRACT EXCEEDS \$100,000, FAR 52.203-12 LIMITATION ON PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS:** Change “1997” to “2003.”

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE IF THE SUBCONTRACT EXCEEDS \$100,000, DEAR 970.5227-5 NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT:** Change “DEC 2000” to “AUG 2002.”

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE IF THE SUBCONTRACT EXCEEDS \$100,000, DEAR 970.5232-3 ACCOUNTS, RECORDS, AND INSPECTION (DEC 2000):** Move this clause to the proper numeric place in the section entitled “CLAUSES INCORPORATED BY REFERENCE, APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW”.

NOTE: move this to proper numeric place so that sequential type numbering in model is maintained.

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE IF THE SUBCONTRACT EXCEEDS \$500,000, FAR 52.219-9 SMALL BUSINESS SUBCONTRACTING PLAN:** Change “OCT 2000” to “JAN 2002.”

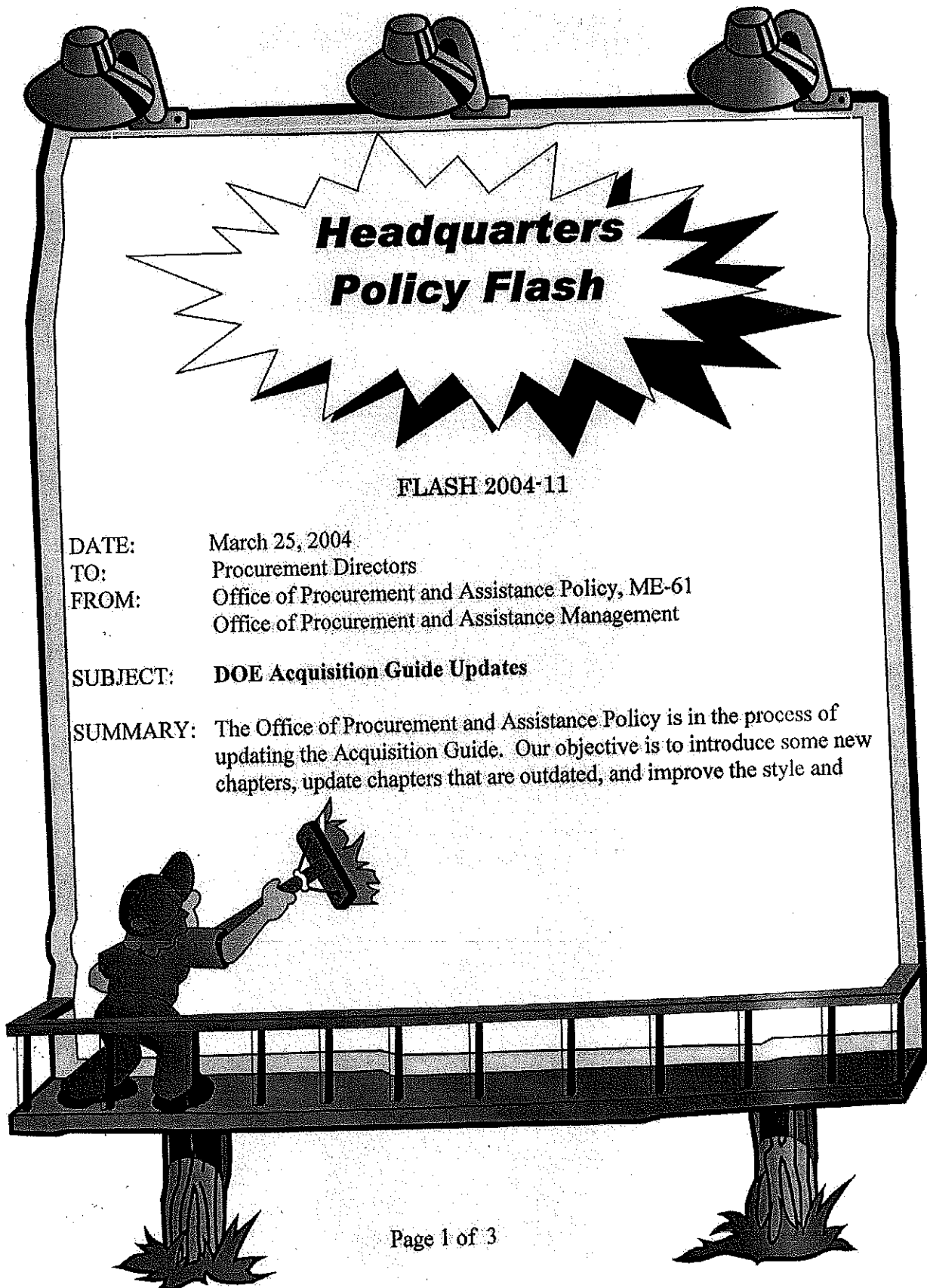
**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE IF THE SUBCONTRACT EXCEEDS \$500,000:** Insert a new item “FAR 52.230-2 COST ACCOUNTING STANDARDS (APR 1998), excluding paragraph (b). Applies to nonprofit organizations if they are subject to full CAS coverage as set forth in 48 CFR Chapter 99, Subpart 9903.201-2 (FAR Appendix B).”

NOTE: move this to proper numeric place so that sequential type numbering in model is maintained.

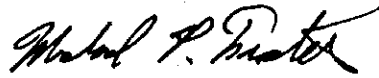
**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE IF THE SUBCONTRACT EXCEEDS \$500,000:** Insert a new item “FAR 52.230-3 DISCLOSURE AND CONSISTENCY OF COST ACCOUNTING PRACTICES (APR 1998), excluding paragraph (b). Applies to nonprofit organizations if they are subject to modified CAS coverage as set forth in 48 CFR Chapter 99, Subpart 9903.201-2 (FAR Appendix B).”

NOTE: move this to proper numeric place so that sequential type numbering in model is maintained.

**CLAUSE 10 – CLAUSES INCORPORATED BY REFERENCE, APPLICABLE IF THE SUBCONTRACT EXCEEDS \$500,000, FAR 52.230-5 COST ACCOUNTING STANDARDS – EDUCATIONAL INSTITUTION:** After “(APR 1998)”, insert “excluding paragraph (b).”



appearance of the remaining chapters. This Flash transmits the first installment of this project. Additional installments will follow as they are completed. Most of the updated chapter revisions are editorial in nature but there are also chapters with significantly updated materials and a few new chapters as well. Copies are not attached but have been posted to the Home Page. A listing is attached.



Michael Fischetti  
Acting Director  
Office of Procurement and  
Assistance Policy

Department of Energy Acquisition Guide March 2004 Updates			
Chapter	Title	Author	Nature of Change
New Chapters			
42.5	Contract Management Planning	ME-62, J. Tower	New Coverage (Issued 02/04)
70.31	Costs Associated with Whistleblower Activities	ME-61, T. Sheppard	New Coverage – Replaces AL 2001-03
Revised Chapters			
4.1	Procurement and Assistance Data System (PADS) Reporting	ME-651, P. Coombs	Content Update – FPDS-NG and Financial Assistance Coverage Added
7.1	Acquisition Planning	ME-62, T. Brown	Materials updated and 2 new attachments are added which include an Acquisition Plan Preparation Guide and an Acquisition Plan Template
17.3	Acquisition, Use and Disposal of Real Estate	ME-90, A. Duran	Content Update – New Organizational Contacts and Editorial Updates
71.1	Headquarters Review of Contract and Financial Assistance Actions	ME-62, T. Brown	Revised to Address Contract Management Planning and Editorial Updates (Issued 02/04)
Editorial Revisions			
1.1	Acquisition Regulation System	ME-61, M. Righi	Editorial Only
1.2	Balanced Scorecard Performance Assessment	ME-62, S. Logan	Editorial Only
3.1	Procurement Integrity	ME-61, S. Zvolensky	Editorial Only
3.2	Antitrust Teaming	ME-61, R. Webb	Editorial Only
9.1	Organizational Conflicts of Interest	ME-61, R. Webb	Editorial Only
9.2	Performance Guarantees	ME-61, R. Webb	Editorial Only
9.3	Debarment and Suspension	ME-65, C. Yee	Editorial Only
15.2	Unsolicited Proposals	NETL, J. Augustine	Editorial Only
31.1	Cost Reasonableness	ME-61, T. Sheppard	Editorial Only

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**Department of Energy**  
Acquisition Guide  
*A DOE Guide to the  
Award and Administration of Contracts*

Office of Procurement and Assistance Management  
Office of Procurement and Assistance Policy

**March 25, 2004**

***"Note: The DOE Acquisition Guide is updated on a regular basis - suggestions for additional topics and revisions to the Guide should be directed to Richard Langston at [richard.langston@hq.doe.gov](mailto:richard.langston@hq.doe.gov)"***

***The html versions of the Acquisition Guide Chapters are best viewed and printed using Microsoft Internet Explorer*** A list of updates is at the bottom of this file.

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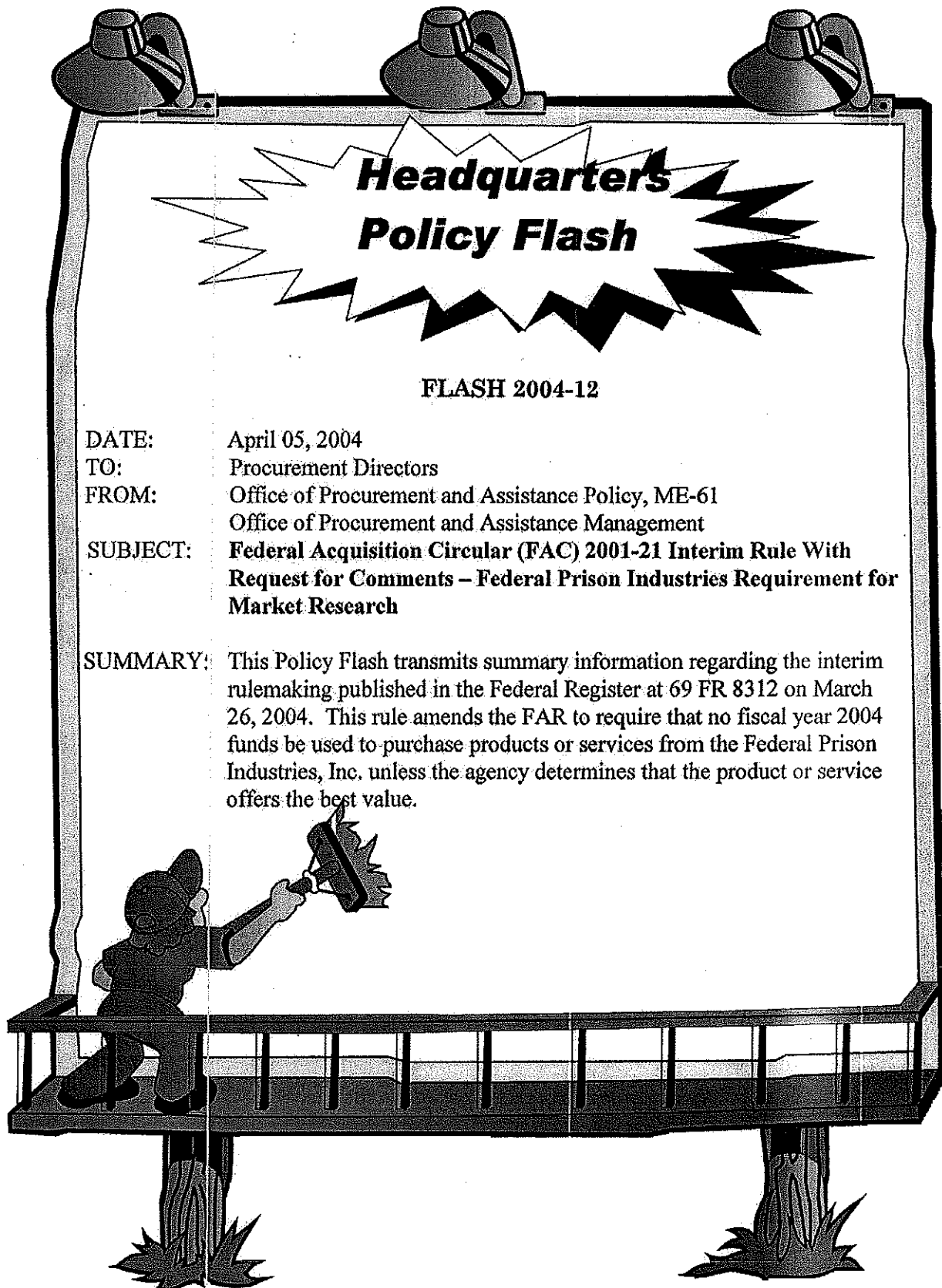
*NOTE: "Procurement Executive" as used in the Acquisition Guide refers to the Director, Office of Procurement and Assistance Management. DOE, for non-National Nuclear Security Administration (NNSA) activities, and to the Administrator, National Nuclear Security Administration for NNSA activities. In most cases the Procurement Executive-related authorities of the Administrator, NNSA have been delegated to the Director, Office of Procurement and Assistance Management, NNSA.*

## Acquisition Guide Updates

## Department of Energy Acquisition Guide

### Status of Revisions

[Status of Revisions \(Word\)](#)



**FLASH 2004-12**  
**April 5, 2004**

**Federal Acquisition Circular (FAC) 2001-21**

The following item is available via the internet at  
<http://www.acqnet.gov/far/FAC/fac2001-21.pdf>

*Effective Date: March 26, 2004*

**Federal Prison Industries-Requirement for Market Research (FAR Case 2003-023)**

This interim rule amends FAR parts 8, Required Sources of Supplies and Services, 19, Small Business Programs, 42, Contract Administration and Audit Services, and 52, Solicitation Provisions and Contract Clauses.

This rule provides that no appropriated funds may be expended for the purchase of products or services offered by the Federal Prison Industries, Inc. (FPI), unless the agency making the purchase determines that the offered product or service provides the best value to the buying agency in accordance with the applicable procurement regulations. The rule-

- Requires that market research be conducted before purchasing from FPI to determine if the product best meets the Government's needs in terms of price, quality, and time of delivery;
- Provides for the use of competitive procedures if FPI supplies are determined non-comparable to those available from the private sector in one or more of the areas listed above;
- Limits inmate worker's access to information; and
- Prohibits the use of FPI as a sub-contractor.

**FLASH 2004-05**

**April 5, 2004**

Written comments to the interim rulemaking are due in this office on or before May 12, 2004. This will allow us time to prepare a consolidated response to the General Services Administration, as necessary.

Questions concerning this Flash should be directed to Denise P. Wright on (202) 586-6217 or via e-mail at [Denise.Wright@hq.doc.gov](mailto:Denise.Wright@hq.doc.gov)



Michael P. Fischetti, Acting Director  
Office of Procurement and  
Assistance Policy

cc:  
PPAG Members



# Federal Register

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Friday,  
March 26, 2004

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## Part IV

### **Department of Defense General Services Administration National Aeronautics and Space Administration**

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**48 CFR Chapter 1  
Federal Acquisition Regulations; Purchases  
from Federal Prison Industries—  
Requirement for Market Research and  
Small Entity Compliance Guide; Interim  
Rules**

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 8, 19, 42, and 52****[FAC 2001-21; FAR Case 2003-023]****RIN 9000-AJ91****Federal Acquisition Regulation;  
Purchases From Federal Prison  
Industries—Requirement for Market  
Research**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 637 of Division F of the Consolidated Appropriations Act, 2004. Section 637 provides that no fiscal year 2004 funds shall be expended for purchase of a product or service offered by Federal Prison Industries, Inc., unless the agency making the purchase determines that the offered product or service provides the best value to the buying agency.

**DATES:** *Effective Date:* March 26, 2004.

*Comment Date:* Interested parties should submit comments to the FAR Secretariat at the address shown below on or before May 25, 2004, to be considered in the formulation of a final rule.

**ADDRESSES:**

Submit written comments to— General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW, Room 4035, Attn: Ms. Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to— [farcase.2003-023@gsa.gov](mailto:farcase.2003-023@gsa.gov).

Please submit comments only and cite FAC 2001-21, FAR case 2003-023, in all correspondence related to this case.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755, for information pertaining to status or publication schedules. The TTY Federal Relay Number for further information is 1-800-877-8973. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501-

1900. Please cite FAC 2001-21, FAR case 2003-023.

**SUPPLEMENTARY INFORMATION:****A. Background**

Section 637 of Division F of the Consolidated Appropriations Act, 2004 (Pub. L. 108-199) provides that none of the funds made available under that or any other Act for fiscal year 2004 shall be expended for the purchase of a product or service offered by Federal Prison Industries, Inc. (FPI), unless the agency making such purchase determines that the offered product or service provides the best value to the buying agency pursuant to Governmentwide procurement regulations issued pursuant to 41 U.S.C. 421(c)(1) that impose procedures, standards, and limitations of 10 U.S.C. 2410n.

This interim rule implements Section 637 by amending the FAR to incorporate the requirements of 10 U.S.C. 2410n with regard to purchase of products from FPI. The rule addresses—

- Requirements for conducting market research before purchasing supplies listed in the FPI Schedule;
- Use of competitive procedures if FPI supplies are found to be noncomparable to supplies available from the private sector;
- Limitations on an inmate worker's access to information; and
- Prohibitions on requiring use of FPI as a subcontractor.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**B. Regulatory Flexibility Act**

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the rule will permit small entities to compete with FPI for contract awards under certain conditions. An Initial Regulatory Flexibility Analysis has been prepared and is summarized as follows:

The rule implements the Consolidated Appropriations Act, 2004, Division F, Section 637 (Public Law 108-199). The Act imposes the procedures, standards, and limitations of 10 U.S.C. 2410n, which requires market research before purchasing a product listed in the FPI catalog, to determine whether the FPI product is comparable to products available from the private sector that best meet the agency's needs in terms of price, quality, and time of delivery. If the FPI product is not

comparable, the agency must use competitive procedures to acquire the product or must make an individual purchase under a multiple award contract. In conducting such a competition or making such a purchase, the agency must consider a timely offer from FPI. The impact of the rule is unknown at this time. The elimination of FPI as a mandatory source may have an impact on those small businesses that supply FPI with raw materials, equipment and services. However, the rule could benefit small business concerns that offer products comparable to those listed in the FPI catalog, by permitting those concerns to compete for Federal contract awards.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 8, 19, 42, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001-21, FAR case 2003-023), in correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**D. Determination to Issue an Interim Rule**

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement Section 637 of Division F of Public Law 108-199, the Consolidated Appropriations Act, 2004. Section 637 provides that no fiscal year 2004 funds shall be expended for purchase of a product or service offered by Federal Prison Industries, Inc., unless the agency making such purchase determines that the offered product or service provides the best value to the buying agency pursuant to Governmentwide procurement regulations, issued pursuant to 41 U.S.C. 421(c)(1), that impose procedures, standards, and limitations of 10 U.S.C. 2410n. Section 637 became effective on January 23, 2004. However, pursuant to Public Law 98-577 and FAR 1.501, the Councils will consider public

comments received in response to this interim rule in the formation of the final rule.

**List of Subjects in 48 CFR Parts 8, 19, 42, and 52**

Government procurement.

Dated: March 22, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2001-21 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001-21 are effective March 26, 2004.

Dated: March 22, 2004.

Deidre A. Lee,

Director, Defense Procurement and Acquisition Policy.

Dated: March 18, 2004.

David A. Drabkin,

Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: March 18, 2004.

James A. Balinskas,

Acting Assistant Administrator for Procurement, National Aeronautics and Space Administration.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 8, 19, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 8, 19, 42, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES**

■ 2. Revise subpart 8.6 to read as follows:

**Subpart 8.6—Acquisition from Federal Prison Industries, Inc.**

Sec.

8.601 General.

8.602 Policy.

8.603 Purchase priorities.

8.604 Waivers.

8.605 Exceptions.

8.606 Evaluating FPI performance.

8.607 Performance as a subcontractor.

8.608 Protection of classified and sensitive information.

**8.601 General.**

(a) Federal Prison Industries, Inc. (FPI), also referred to as UNICOR, is a self-supporting, wholly owned

Government corporation of the District of Columbia.

(b) FPI provides training and employment for prisoners confined in Federal penal and correctional institutions through the sale of its supplies and services to Government agencies (18 U.S.C. 4121-4128).

(c) FPI diversifies its supplies and services to minimize adverse impact on private industry.

(d) Supplies manufactured and services performed by FPI are listed in the FPI Schedule, which can be accessed at <http://www.unicor.gov> or by submitting a written request to Federal Prison Industries, Inc., Department of Justice, Washington, DC 20534.

**8.602 Policy.**

(a) Agencies shall purchase required supplies of the classes listed in the Schedule of Products made in Federal Penal and Correctional Institutions (referred to in this subpart as "the FPI Schedule") at prices not to exceed current market prices, using the procedures in this subpart.

(b) For purchases made by civilian agencies using fiscal year 2004 appropriated funds, and for all purchases made by DoD (Section 637 of Division F of Public Law 108-199, the Consolidated Appropriations Act, 2004; 10 U.S.C. 2410n), agencies shall—

(1) Before purchasing an item of supply listed in the FPI Schedule, conduct market research to determine whether the FPI item is comparable to supplies available from the private sector that best meet the Government's needs in terms of price, quality, and time of delivery. This is a unilateral determination made at the discretion of the contracting officer. The arbitration provisions of 18 U.S.C. 4124(b) do not apply;

(2) Prepare a written determination that includes supporting rationale explaining the assessment of price, quality, and time of delivery, based on the results of market research comparing the FPI item to supplies available from the private sector;

(3) If the FPI item is comparable, purchase the item from FPI following the ordering procedures at <http://www.unicor.gov>, unless a waiver is obtained in accordance with 8.604; and

(4) If the FPI item is not comparable in one or more of the areas of price, quality, and time of delivery—

(i) Acquire the item using—

(A) Competitive procedures (e.g., the procedures in 8.102, the set-aside procedures in subpart 19.5, or competition conducted in accordance with part 13); or

(B) The fair opportunity procedures in 16.505, if placing an order under a multiple award delivery-order contract;

(ii) Include FPI in the solicitation process and consider a timely offer from FPI for award in accordance with the requirements and evaluation factors in the solicitation; and

(iii) When using a multiple award schedule issued under the procedures in subpart 8.4 or when making an award using the fair opportunity procedures in 16.505—

(A) Establish and communicate to FPI the requirements and evaluation factors that will be used as the basis for selecting a source, so that an offer from FPI can be evaluated on the same basis as the contract or schedule holder; and

(B) Consider a timely offer from FPI.

(c) The procedures in paragraph (b) of this section do not apply if an exception in 8.605 applies and the purchase is made from a source other than FPI.

(d) In some cases where FPI and a JWOD participating nonprofit agency produce identical items (see 8.603), FPI grants a waiver to permit the Government to purchase a portion of its requirement from the JWOD participating nonprofit agency. When this occurs, the portion of the requirement for which FPI has granted a waiver—

(1) Shall be purchased from the JWOD participating nonprofit agency using the procedures in subpart 8.7; and

(2) Shall not be subject to the procedures in paragraph (b) of this section.

(e) For civilian agency purchases made using other than fiscal year 2004 appropriated funds, the following policy applies:

(1) Agencies shall purchase required supplies of the classes listed in the FPI Schedule at prices not to exceed current market prices following the ordering procedures at <http://www.unicor.gov>, unless a waiver is obtained in accordance with 8.604.

(2) If the contracting officer believes that the FPI price exceeds the market price, the matter may be referred to the cognizant product division identified in the FPI Schedule or to the FPI Washington office for resolution.

(f) Disputes regarding price, quality, character, or suitability of supplies produced by FPI, except for determinations under paragraph (b)(1) of this section, are subject to arbitration as specified in 18 U.S.C. 4124. The statute provides that the arbitration shall be conducted by a board consisting of the Comptroller General of the United States, the Administrator of General Services, and the President, or their representatives. The decisions of the



board are final and binding on all parties.

#### 8.603 Purchase priorities.

FPI and nonprofit agencies participating in the Javits-Wagner-O'Day (JWOD) Program (see subpart 8.7) may produce identical supplies or services. When this occurs, ordering offices shall purchase supplies and services in the following priorities:

- (a) *Supplies.* (1) Federal Prison Industries, Inc. (41 U.S.C. 48).
- (2) JWOD participating nonprofit agencies.
- (3) Commercial sources.
- (b) *Services.* (1) JWOD participating nonprofit agencies.
- (2) Federal Prison Industries, Inc., or commercial sources.

#### 8.604 Waivers.

FPI may grant a waiver for purchase of supplies in the FPI Schedule from another source. FPI waivers ordinarily are of the following types:

- (a) General or blanket waivers issued when classes of supplies are not available from FPI.
- (b) Formal waivers issued in response to requests from offices desiring to acquire, from other sources, supplies listed in the FPI Schedule and not covered by a general waiver. Agencies shall process waiver requests in accordance with the procedures at <http://www.unicor.gov>.

#### 8.605 Exceptions.

Purchase from FPI is not mandatory and a waiver is not required if—

- (a) The policy at 8.602(b) applies to the acquisition and—

(1) The contracting officer makes a determination that the FPI item of supply is not comparable to supplies available from the private sector that best meet the Government's needs in terms of price, quality, and time of delivery; and

(2) The item is acquired in accordance with 8.602(b)(4);

(b) Public exigency requires immediate delivery or performance;

(c) Suitable used or excess supplies are available;

(d) The supplies are acquired and used outside the United States;

(e) Acquiring listed items totaling \$2,500 or less; or

(f) Acquiring services.

#### 8.606 Evaluating FPI performance.

Agencies shall evaluate FPI contract performance in accordance with subpart 42.15. Performance evaluations do not negate the requirements of 8.602 and 8.604, but they may be used to support a waiver request in accordance with 8.604.

#### 8.607 Performance as a subcontractor.

Agencies shall not require a contractor, or subcontractor at any tier, to use FPI as a subcontractor for performance of a contract by any means, including means such as—

(a) A solicitation provision requiring a potential contractor to offer to make use of FPI supplies or services;

(b) A contract specification requiring the contractor to use specific supplies or services (or classes of supplies or services) offered by FPI; or

(c) Any contract modification directing the use of FPI supplies or services.

#### 8.608 Protection of classified and sensitive information.

Agencies shall not enter into any contract with FPI that allows an inmate worker access to any—

- (a) Classified data;
- (b) Geographic data regarding the location of—

(1) Surface and subsurface infrastructure providing communications or water or electrical power distribution;

(2) Pipelines for the distribution of natural gas, bulk petroleum products, or other commodities; or

(3) Other utilities; or

(c) Personal or financial information about any individual private citizen, including information relating to such person's real property however described, without the prior consent of the individual.

#### 8.704 [Amended]

- 3. Amend section 8.704 in paragraph (c) by removing "clearance (8.605)" and adding "waiver (8.604)" in its place.

### PART 19—SMALL BUSINESS PROGRAMS

#### 19.502-1 [Amended]

- 4. Amend section 19.502-1 in paragraph (b) by removing "Federal Prison Industries,".

- 5. Add section 19.504 to read as follows:

#### 19.504 Inclusion of Federal Prison Industries, Inc.

When using competitive procedures in accordance with 8.602(b)(4), agencies shall include Federal Prison Industries, Inc. (FPI), in the solicitation process and consider a timely offer from FPI.

- 6. Amend section 19.508 by adding a sentence to the end of paragraphs (c) and (d) to read as follows:

#### 19.508 Solicitation provisions and contract clauses.

\* \* \* \* \*

(c) \* \* \* Use the clause at 52.219-6 with its Alternate II when including FPI in the competition in accordance with 19.504.

(d) \* \* \* Use the clause at 52.219-7 with its Alternate II when including FPI in the competition in accordance with 19.504.

\* \* \* \* \*

### PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

#### 42.1503 [Amended]

- 7. Amend section 42.1503 in the seventh sentence of paragraph (b) by removing "clearance request (see 8.605)" and adding "waiver request (see 8.604)" in its place.

### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 8. Amend section 52.212-5 by revising the date of the clause; and adding paragraphs (b)(5)(iii) and (b)(6)(iii) to read as follows:

#### 52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

\* \* \* \* \*

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (MAR 2004)

\* \* \* \* \*

(b) \* \* \*

(5) \* \* \*

— (iii) Alternate II (MAR 2004) of 52.219-6.

(6) \* \* \*

— (iii) Alternate II (MAR 2004) of 52.219-7.

\* \* \* \* \*

- 9. Amend section 52.219-6 by adding Alternate II to read as follows:

#### 52.219-6 Notice of Total Small Business Set-Aside.

\* \* \* \* \*

Alternate II (MAR 2004). As prescribed in 19.508(c), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) *General.* (1) Offers are solicited only from small business concerns and Federal Prison Industries, Inc. (FPI). Offers received from concerns that are not small business concerns or FPI shall be considered nonresponsive and will be rejected.

(2) Any award resulting from this solicitation will be made to either a small business concern or FPI.

- 10. Amend section 52.219-7 by adding Alternate II to read as follows:

**52.219-7 Notice of Partial Small Business Set-Aside.**

\* \* \* \* \*

Alternate II (MAR 2004). As prescribed in 19.508(d), add the following paragraph (d) to the basic clause:

(d) Notwithstanding paragraph (b) of this clause, offers from Federal Prison Industries, Inc., will be solicited and considered for both the set-aside and non-set-aside portion of this requirement.

[FR Doc. 04-6800 Filed 3-25-04; 8:45 am]

BILLING CODE 6820-EP-P

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Chapter 1****Federal Acquisition Regulation; Small  
Entity Compliance GUIDE**

**AGENCIES:** Department of Defense (DoD),  
General Services Administration (GSA),

and National Aeronautics and Space  
Administration (NASA).

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2001-21 which amends the FAR. An asterisk (\*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2001-21 which precedes this document. These documents are also available via the Internet at <http://www.arnet.gov/far>.

**FOR FURTHER INFORMATION CONTACT:**  
Laurie Duarte, FAR Secretariat, (202)  
501-4225. For clarification of content,  
contact Ms. Linda Nelson at (202) 501-  
1900.

**\* Purchases From Federal Prison  
Industries—Requirement for Market  
Research (FAR Case 2003-023)**

This interim rule amends FAR parts 8, 19, 42, and 52 to implement section 637 of Division F of the consolidated Appropriations Act, 2004. Section 637 provides that no fiscal year 2004 funds shall be expended for purchase of a product or service offered by Federal Prison Industries, Inc., unless the agency making the purchase determines that the offered product or service provides the best value to the buying agency.

Dated: March 22, 2004.

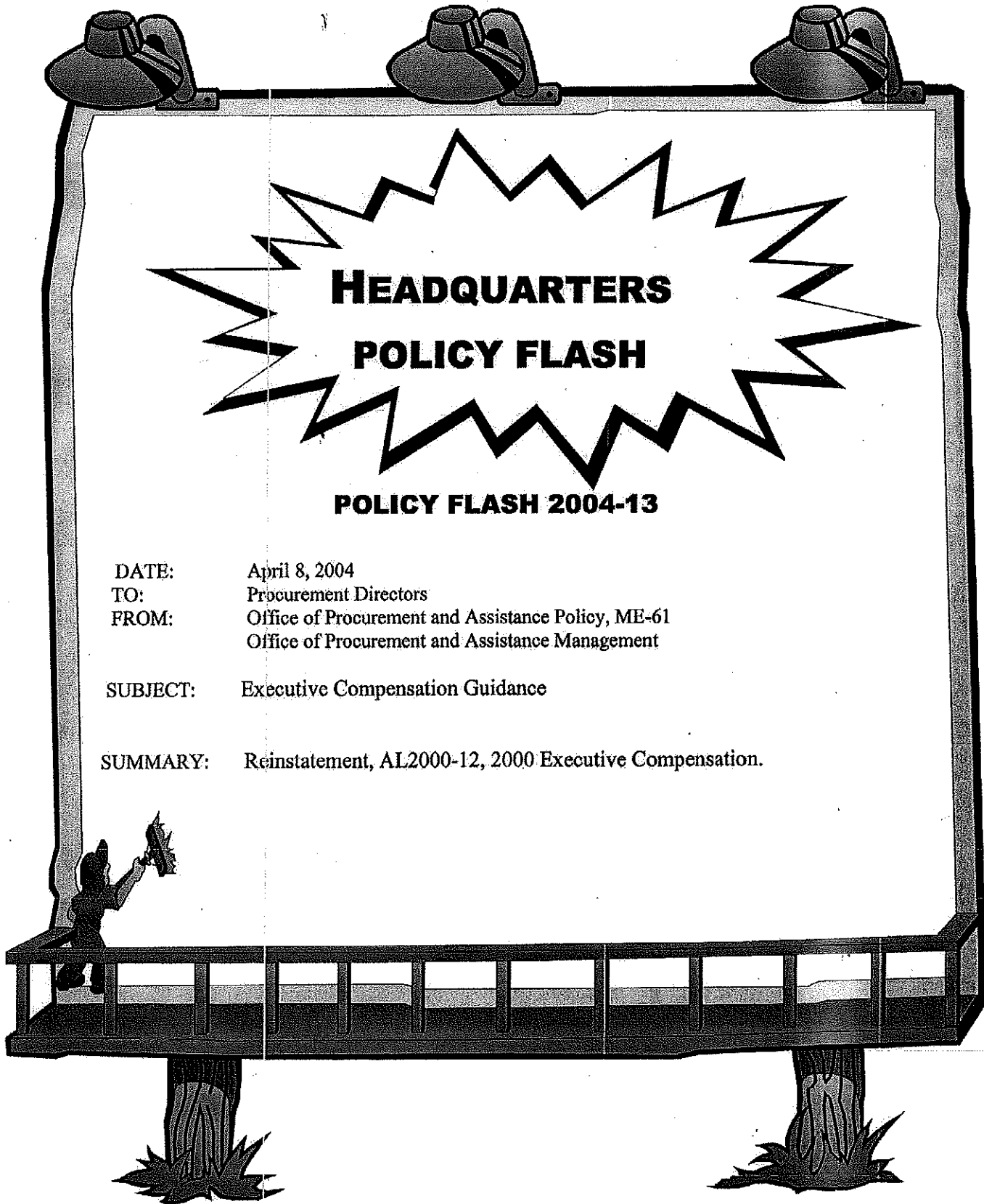
**Laura Auletta,**

*Director, Acquisition Policy Division.*

[FR Doc. 04-6801 Filed 3-25-04; 8:45 am]

BILLING CODE 6820-EP-P

TERRY



DATE: April 8, 2004  
TO: Procurement Directors  
FROM: Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management  
SUBJECT: Executive Compensation Guidance  
SUMMARY: Reinstatement, AL2000-12, 2000 Executive Compensation.

## **POLICY FLASH 2004-13**

**April 8, 2004**

The DOE Executive Salary Approval parameters contained in AL2000-12 are hereby reinstated pending final issuance of revised DOE Order 350.1X, Contractor Human Resources Management Programs, except for those portions which address the Office of Federal Procurement Policy "benchmark compensation amounts." Those amounts have been revised annually with the latest being contained in Policy Flash 2003-19, August 26, 2003.

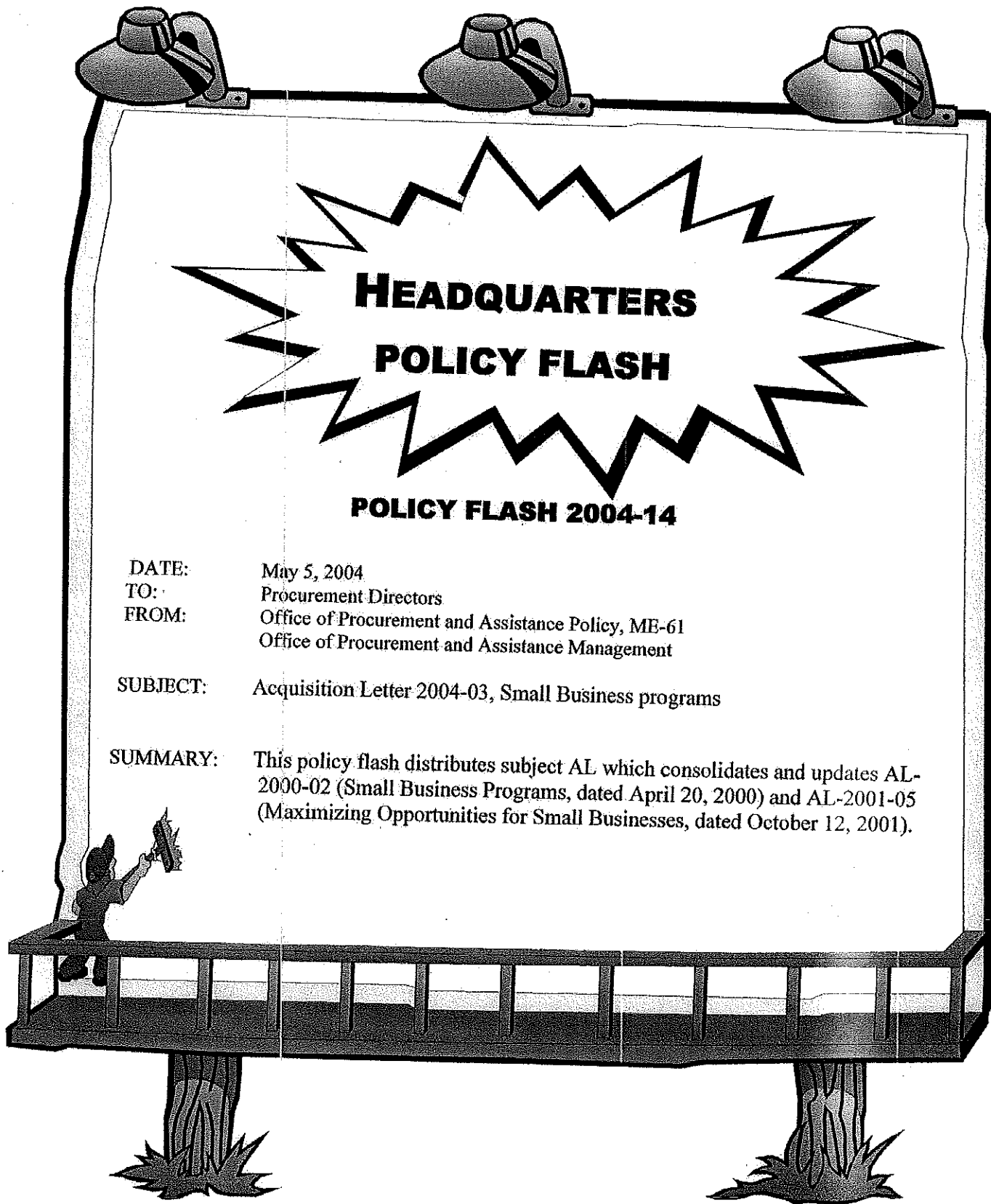
AL2004-01R2 is revised and reissued to incorporate this change.

If there are any questions regarding this matter, please contact Terry Sheppard at (202) 586-8193 or via email at [terry.sheppard@hq.doe.gov](mailto:terry.sheppard@hq.doe.gov)



Michael Fischetti,  
Acting Director  
Office of Procurement and  
Assistance Policy, OMBE

cc: PPAG Members

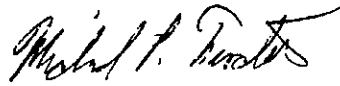


**DATE:** May 5, 2004  
**TO:** Procurement Directors  
**FROM:** Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management  
**SUBJECT:** Acquisition Letter 2004-03, Small Business programs

**SUMMARY:** This policy flash distributes subject AL which consolidates and updates AL-2000-02 (Small Business Programs, dated April 20, 2000) and AL-2001-05 (Maximizing Opportunities for Small Businesses, dated October 12, 2001).

## **POLICY FLASH 2004-14**

If there are any questions regarding this matter, please contact Steve Zvolensky at (202) 586-5936 or via email at [Stephen.Zvolensky@hq.doe.gov](mailto:Stephen.Zvolensky@hq.doe.gov)



Michael Fischetti,  
Acting Director  
Office of Procurement and  
Assistance Policy, OMBE



**Department of Energy  
Acquisition Regulation**

**No. 2004-03**

**Date 05/05/04**

# **ACQUISITION LETTER**

This Acquisition Letter is issued under the authority of the DOE and NNSA Procurement Executives.

**Subject: Small Business Programs**

**References:**

FAR 7.107	Additional requirements for acquisitions involving bundling
FAR 19.201	General policy
FAR 19.202-1	Encouraging small business participation in acquisitions
FAR 19.302	Protesting a small business representation
FAR 19.306	Protesting a firm's status as a HUBZone small business concern
FAR 19.307	Solicitation provisions
FAR Subpart 19.5	Set-Asides for Small Business
FAR Subpart 19.7	The Small Business Subcontracting Program
FAR Subpart 19.8	Contracting with the Small Business Administration (The 8(a) Program)
FAR Subpart 19.9	Very Small Business Pilot Program
FAR Subpart 19.10	Small Business Competitiveness Demonstration Program
FAR Subpart 19.11	Price Evaluation Adjustment for Small Disadvantaged Business Concerns
FAR Subpart 19.12	Small Disadvantaged Business Participation Program
FAR Subpart 19.13	Historically Underutilized Business Zone (HUBZone) Program
FAR Subpart 26.1	Indian Incentive Program
FAR 52.219-10	Incentive Subcontracting Program
FAR 52.219-22	Small Disadvantaged Business Status
FAR 52.219-23	Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns
FAR 52.219-24	Small Disadvantaged Business Participation Program-Targets
FAR 52.219-25	Small Disadvantaged Business Participation Program-Disadvantaged Status and Reporting
FAR 52.226-1	Utilization of Indian Organizations and Indian-Owned Economic Enterprises
DEAR Subpart 919.5	Set-Asides for Small Business
DEAR Subpart 919.7	Subcontracting with Small Business, Small Disadvantaged Business, and Women-Owned Small Business Concerns
DEAR Subpart 919.8	Contracting with the Small Business Administration (The 8(a) Program)
DEAR Subpart 919.70	The Department of Energy Mentor-Protégé Program
DEAR 970.1504-4-1	Make-or-buy plans
DEAR 970.5215-2	Make-or-buy plan
DOE Acquisition Guide Chapter 38	Task Order Contracting
13 CFR Chapter 1	Small Business Administration
OFPP Letter 99-1	Small Business Procurement Goals

### **Effective date of the Acquisition Letter (AL)**

This AL is effective 10 business days from the date of issuance.

### **AL Expiration**

This AL remains in effect until superseded or canceled. This AL supersedes AL-2000-02 (Small Business Programs, dated April 20, 2000) and AL-2001-05 (Maximizing Opportunities for Small Businesses, dated October 12, 2001), which are rescinded in their entirety.

### **Points of Contact**

Contact Stephen Zvolensky of the Department of Energy (DOE) Office of Procurement and Assistance Policy at (202) 586-5936, or at [stephen.zvolensky@hq.doe.gov](mailto:stephen.zvolensky@hq.doe.gov), or Gary Lyttek, National Nuclear Security Administration (NNSA) Office of Acquisition and Supply Management at (202) 586-8304, or at [gary.lyttek@nnsa.doe.gov](mailto:gary.lyttek@nnsa.doe.gov).

Visit the website at <http://professionals.pr.doe.gov> for information on Acquisition Letters and other policy issues.

### **Purpose of the AL**

The purpose of this AL is to make available guidance on contracting with small business concerns.

This AL is divided into three parts: Part I applies to the award of prime contracts; Part II applies to the award of subcontracts; and Part III includes other considerations.

### **Background on Small Business**

The Small Business Act contains a government-wide goal for participation by small business concerns of not less than 23 percent of the total value of all prime contract awards for each fiscal year as well as individual goals for women-owned small business concerns (5%), small disadvantaged business concerns (5%), service-disabled veteran-owned small business concerns (3%) and HUBZone small business concerns (3%). The Act further provides that agencies negotiate annual goals with the Small Business Administration (SBA).

In September of 2002, Secretary Spencer Abraham issued his "Policy Statement Supporting Small Businesses in Implementing DOE Missions." In that statement, the Secretary directed all departmental elements to examine and seek to expand their grant and contract opportunities with small businesses and tasked the Director of the Office of Small and Disadvantaged Business Utilization (OSDBU) to prepare a comprehensive small business strategy to ensure that small businesses are provided the maximum practicable opportunity to participate in departmental programs at the prime contract level. Additionally, the policy directed that the plan include a strategy to increase the level and expand the types of subcontracts awarded to small business by the Department's facilities management contractors.



In May of 2003, the OSDBU issued a Small Business Strategic Plan that provides steps the department will take to increase its small business awards. The Plan is posted on the OSDBU website: [http://smallbusiness.doe.gov/OSDBU\\_Strategic\\_Plan.pdf](http://smallbusiness.doe.gov/OSDBU_Strategic_Plan.pdf)

An "Advanced Planning Acquisition Team" (APAT) has been established to review acquisition requests over \$3 million for their ability to be set aside for small business. The team consists of representatives of the program office requesting the acquisition, the Office of Procurement and Assistance Management, the OSDBU and the SBA Procurement Center Representative (PCR). [Note the APAT requirement does not apply to NNSA.]

## Definitions

**"8(a) contractor"** means a concern, certified by the SBA, to be eligible to participate in the SBA 8(a) program, established by section 8 (a) of the Small Business Act, 15 U.S.C. section 637(a), which authorizes the SBA to enter into all types of contracts with other agencies and award subcontracts for performing these contracts with eligible 8(a) contractors.

**"HUBZone"** means a historically underutilized business zone that is an area located within one or more qualified census tracts, qualified nonmetropolitan counties, or lands within the external boundaries of an Indian reservation.

**"HUBZone small business concern"** means a small business concern that appears on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration.

**"Small business concern"** means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on government contracts, and qualified as a small business under the criteria and size standards in 13 CFR part 121 (see 19.102). Such a concern is "not dominant in its field of operation" when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration shall be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity.

**"Small disadvantaged business concern"** (except for 52.212-3(c)(2) and 52.219-1(b)(2) for general statistical purposes and 52.212-3(c)(7)(ii), 52.219-22(b)(2), and 52.219-23(a) for joint ventures under the price evaluation adjustment for small disadvantaged business concerns), means an offeror that represents, as part of its offer, that it is a small business under the size standard applicable to the acquisition; and either (1) It has received certification as a small disadvantaged business concern consistent with 13 CFR part 124, subpart B; and (i) No material change in disadvantaged ownership and control has occurred since its certification; (ii) Where the concern is owned by one or more disadvantaged individuals, the net worth of each individual upon whom the certification is based does not exceed \$750,000 after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); and (iii) It is identified, on the date of its representation, as a certified small disadvantaged business concern in the data base maintained by the Small Business Administration (PRO-Net); or (2) For a prime contractor, it has submitted a completed application to the Small Business Administration or a private certifier

to be certified as a small disadvantaged business concern in accordance with 13 CFR part 124, subpart B, and a decision on that application is pending, and that no material change in disadvantaged ownership and control has occurred since it submitted its application. In this case, a contractor must receive certification as a small disadvantaged business by the Small Business Administration prior to contract award.

**"Service-disabled veteran-owned small business concern"** means a small business concern- (i) Not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and (ii) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran. Service-disabled veteran means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

**"Veteran-owned small business concern"** means a small business concern- (1) Not less than 51 percent of which is owned by one or more veterans (as defined at 38 U.S.C. 101(2)) or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and (2) The management and daily business operations of which are controlled by one or more veterans.

**"Women-owned small business concern"** means a small business concern- (1) That is at least 51 percent owned by one or more women; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and (2) Whose management and daily business operations are controlled by one or more women.

**Part I. Prime Contracting**

- A. SMALL BUSINESS CONTRACTING PROCESSES**
- B. SMALL BUSINESS PROCUREMENT TOOLS**
- C. SMALL BUSINESS MARKET RESEARCH**
- D. SMALL BUSINESS ACQUISITION PLANNING**

**Part II. Subcontracting with Small Business**

- A. SUBCONTRACTING PLANS**
- B. SUBCONTRACTING PROCEDURES**

**Part III. Other Considerations**

- A. SECURITY CLEARANCES**
- B. SMALL BUSINESS STATISTICS**
- C. CENTRAL CONTRACTOR REGISTRATION DATABASE**
- D. SECRETARY'S SMALL BUSINESS AWARDS**

## **Part I. Prime Contracting**

### **A. SMALL BUSINESS CONTRACTING PROCESSES**

Total small business set-asides. Except for those acquisitions set aside for very small business concerns (see Subpart 19.9), each acquisition of supplies or services that has an anticipated dollar value exceeding \$2,500 (\$15,000 for acquisitions as described in 13.201(g)(1)), but not over \$100,000 (\$250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition at 2.101), is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the Contracting Officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. This obligation also applies to purchase card transactions. The Contracting Officer shall set aside any acquisition over \$100,000 for small business participation when there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns (but see paragraph (c) of this subsection); and (2) award will be made at fair market prices.

Awards to 8(a) Firms. For procurements with an anticipated total value, including options, in excess of \$5,000,000 for acquisitions assigned manufacturing North American Industry Classification System (NAICS) codes and \$3,000,000 for all other acquisitions, if an 8(a) certified firm can be identified with the expectation that the award would be at a fair market price, an award may be made noncompetitively to an 8(a) firm. If the procurement is valued in excess of \$3 million (\$5 million for manufacturing) and two or more capable 8(a) firms can be so identified, the procurement shall be set aside for competition among 8(a) firms (see FAR 19.805-1(a)(2)). Contracting activities may make awards under the 8(a) program with DOE/NNSA Contracting Officers signing on behalf of SBA. This delegated signature authority saves time and effort in completing the award between DOE and SBA and the subcontract between SBA and the selected 8(a) firm.

Set-Asides for Very Small Businesses. Under a statutorily directed pilot program, purchases valued between \$2,500 and \$50,000 must be set aside for very small businesses (those businesses with no more than 15 employees and average annual receipts not exceeding \$1 million). This pilot program applies to supplies procured by DOE offices located in, and to services performed in, designated SBA districts identified in FAR 19.902. Within this dollar range, awards still may be made to 8(a) firms that are not very small businesses.

Small Business Competitiveness Demonstration. DOE is signatory to the Small Business Competitive Demonstration program established by the Small Business Competitiveness Demonstration Program Act of 1988. Currently, the program includes the following NAICS codes: Construction (236,237,238), Non-nuclear Ship Repair (336611), Architectural (541310) and Engineering Services (541330) including Mapping and Surveying (541360, 541370), and Refuse and related services (562). Additionally, as part of the Competitiveness Demonstration Program, participating agencies periodically develop their own list of Targeted Industry Categories (TICs). The intent is to expand participation by small businesses in designated industries, through the use of set-asides, increased management attention, and specifically tailored acquisition procedures. Firms in these TICs should be encouraged to use teaming and

joint venture arrangements that enable them to effectively compete for contracts. This list is currently under review and will be distributed by OSDDBU's when it is finalized.

Price Evaluation Adjustment for Small Disadvantaged Business Concerns. If a procurement is not otherwise set aside, price preferences may be used to facilitate an award to certified small disadvantaged businesses if the acquisition is for items or services in the authorized NAICS industry subsector or HUBZone small business concerns or to a firm that is both. For small disadvantaged businesses the current 10% price preference is known as a "price evaluation adjustment" (see FAR 19.1101). For HUBZone small business concerns, the 10% price preference is known as a "price evaluation preference" (see FAR 19.1307). If a firm is both a HUBZone small business concern and a small disadvantaged business competing for work in one of the designated NAICS industry subsectors, the two preferences can be combined entitling the firm to a 20% price evaluation preference (see FAR 19.1307(d)).

Set-Asides for HUBZone Small Business Concerns. If there is a reasonable expectation that proposals will be received from two or more small businesses certified by the SBA as Historically Underutilized Business Zone concerns and the award would be made at a fair market price, FAR 19.1305(b) requires that the award be set aside for HUBZone small business concerns.

HUBZone sole source awards. Contracting Officers may award contracts to HUBZone small business concerns on a sole source basis without considering small business set-asides provided the acquisition meets requirements of FAR 19.1306(a).

Awards to Native American Business, Tribal Governments, and Alaskan Native Corporations. According to the SBA regulations (see 13 CFR 124.109); a business owned and controlled by a qualifying Native American tribe may qualify as a small disadvantaged business or, as an 8(a) firm, if accepted into the SBA program. Such firms may also qualify as HUBZone small business concerns (13 CFR 126) and would thus be eligible for HUBZone sole source awards (see FAR 19.1306), HUBZone set-asides (see FAR 19.1305), and the price evaluation preference for HUBZone small business concerns (see FAR 19.1307). SBA's rules for businesses owned and controlled by recognized tribal governments and for Alaskan Native Corporations (ANC) that have been admitted to SBA's 8(a) program (see 13 CFR 124.109) include special provisions that do not apply to other 8(a) concerns. Specifically, the 8(a) competitive thresholds of \$5,000,000 for acquisitions assigned manufacturing NAICS codes and \$3,000,000 for all other acquisitions that normally apply to 8(a) acquisitions do not apply to awards made to 8(a) businesses owned by tribal governments or ANCs. That is, awards valued in excess of the competitive threshold may be made to such entities on a sole source basis without regard to the estimated cost of the acquisition (see FAR 19.805-1 and 13 CFR 124.506(a)(iii) and (b)).

Awards to service-disabled veteran-owned small business concerns. On December 16, 2003, President Bush signed the Veterans Benefits Act of 2003 (Public Law No. 108-183 at section 308). This new law requires federal agencies and departments to give special consideration to small business concerns owned and controlled by service-disabled veterans during federal contracting and procurement. An interim rule amending the FAR to implement section 308 of the Veterans Benefits Act of 2003 was published in the May 5, 2004 issue of the Federal Register. The interim rule can be found online at:  
<http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2004/pdf/04-9752.pdf>

## **B. SMALL BUSINESS PROCUREMENT TOOLS**

### **Mentor-Protégé/Teaming**

A proven method of increasing the participation of small businesses in the award of prime contracts is the use of teaming arrangements. DOE and SBA have Mentor-Protégé programs that promote teaming. Contracting Officers who seek to increase contract awards to small businesses can use either the DOE or SBA Mentor-Protégé program. However, if award is made under the DOE program, the Department will not receive credit for a prime contract award as an 8(a) or small business award.

DOE's regulations, which provide for a Mentor-Protégé Program, are at DEAR 919.70. The DOE Mentor-Protégé Program is designed to encourage prime contractors to assist small disadvantaged firms certified by the SBA under Section 8(a) of the Small Business Act, other small disadvantaged businesses, women-owned small businesses, Historically Black Colleges and Universities (HBCU), other minority institutions of higher learning, and small business concerns owned and controlled by service disabled veterans in enhancing their capabilities to perform contracts and subcontracts.

DOE's Mentor-Protégé Program seeks to foster long-term business relationships between these small business entities and prime contractors, and to increase the overall number of these small business entities that receive contract and subcontract awards.

SBA's regulations (see 13 CFR 121.103(f)(3)(iii)) provide for a joint venture that may include a large business and an 8(a) firm which qualify as a Mentor and Protégé, respectively, under SBA's Mentor-Protégé Program (see 13 CFR 124.520). Such a joint venture will be recognized as small for the size standard corresponding to the NAICS code assigned to the procurement, and for purposes of 8(a) sole source procurements, as long as the participating Protégé 8(a) firm has not reached the dollar limit set forth at 13 CFR 124.519. Note: DOE Mentor-Protégé Program participants are not recognized as a small business in a joint venture arrangement.

### **Multiple Award Contracts**

Solicitations for multiple award contracts (MACs) should be structured in a manner that will guarantee small business firms an opportunity to compete for prime contracts, which then will allow them to compete for individual orders under the contracts. The following techniques should be applied when using MACs to fill program requirements: (1) Contracting Officers should work closely with program officials and their Small Business Program Manager to identify small business opportunities early in the acquisition planning process; (2) Business strategies such as teaming arrangements should be encouraged in an effort to maximize opportunities for small businesses. Teaming arrangements not only increase business opportunities for small businesses, but also expand the skill mix of the team in some cases; (3) Multiple award contracts should be set-aside exclusively for competition among small businesses, to the greatest extent practicable; (4) If a total set-aside is not practicable, consideration should be given to identifying opportunities for a component of the statement of work to be set-aside for competition among small businesses; and (5) If a total or partial set-aside is not feasible, consideration should be given to reserving and specifying in the solicitation, a certain number of awards for small businesses.

## Governmentwide Acquisition Contracts

A Governmentwide Acquisition Contract (GWAC)" is a task-order or delivery-order contract for information technology established by one agency for Governmentwide use. GWACs also are referred to as "multi-agency" or "omnibus" contracts. GWACs often simplify the acquisition process for the authorizing agency as the contracting agency may maintain, and make available to the authorizing agency, their list of pre-screened contractors capable of performing certain types of requirements. The Department of Commerce's GWAC is entitled "COMMERce Information Technology Solutions or "COMMITTS" and can be found online at: <http://www.commits.doc.gov/>. A searchable directory of GWACs, multi-agency contracts, Federal Supply Schedule contracts, and other procurement instruments intended for use by multiple agencies, can be found online at: <http://www.contractdirectory.gov/>.

## C. SMALL BUSINESS MARKET RESEARCH

Sources Sought Synopsis. In accordance with FAR 5.2, Synopses of Proposed Contract Actions: Sources Sought Synopsis is a notice published in FedBizOpps at <http://www.fedbizopps.gov/> to improve small business access to acquisition information and enhance competition by identifying contracting and subcontracting opportunities. Although the notice includes "screening criteria", the criteria are not used to "qualify" potential sources or to exclude potential competitors. The purposes of screening respondents are to allow the government to assess the potential competitive base, to determine whether a "Justification for other than full and open competition" is required, or whether various set-asides are appropriate.

Source Lists. The Program Manager and the Contracting Officer should work together to develop a list of sources to which the solicitation is transmitted. The source list should include those potential offerors who have responded affirmatively to the FedBizOpps announcement and those potential offerors whose past and present experience -- in terms of performance capability, logistic support, financial status, production capacity, etc. -- have demonstrated that they could perform the contract and would be inclined to submit a proposal. If in response to the FedBizOpps notice, a source that is not on the list requests a copy of the solicitation, it will be furnished a copy.

Bidders List. FAR 14.204, Records of invitations for bids and records of bids, requires that each contracting office shall retain a record of each invitation that it issues and each abstract or record of bids. Contracting Officers shall review and utilize the information available in connection with subsequent acquisitions of the same or similar items. The file for each invitation shall show the distribution that was made and the date the invitation was issued. The names and addresses of prospective bidders who requested the invitation and were not included on the original solicitation list shall be added to the list and made a part of the record.

Other Market Research Efforts. FAR 10.002(b)(2) includes additional ways agencies can determine industry's capabilities such as: (1) Contacting knowledgeable individuals in Government and industry regarding market capabilities to meet requirements; (2) Reviewing results of recent market research for similar or identical requirements; (3) Publishing formal requests for information in appropriate technical or scientific journals or business publications; (4) Querying the Governmentwide database of contracts and other procurement instruments

intended for use by multiple agencies available at [www.contractdirectory.gov](http://www.contractdirectory.gov) and other Government and commercial databases; (5) Participating in interactive, on-line communication among industry, acquisition personnel, and customers; (6) Obtaining source lists of similar items from other contracting activities or agencies, trade associations or other sources; (7) Reviewing catalogs and other generally available product literature published by manufacturers, distributors, and dealers or available on-line; and (8) Conducting interchange meetings or holding presolicitation conferences to involve potential offerors early in the acquisition process.

## **D. SMALL BUSINESS ACQUISITION PLANNING**

### **Advanced Planning Acquisition Team**

DOE has established an "Advanced Planning Acquisition Team" (APAT), comprised of the Office of Procurement and Assistance Management, the OSDDBU, the Small Business Administration Procurement Center Representative (SBA-PCR) and the element requesting the acquisition. The Contracting Officer will refer to the OSDDBU all proposed acquisitions over \$3 million (new or extension requests of existing acquisitions) which have not been proposed for small business set aside. OSDDBU will review the analysis and conclusions with respect to the proposed action to determine if it is justified to not set it aside and, when justified, identify strategies to maximize small business participation as subcontractors. These reviews will apply to all procurement requests, including M&O contracts, orders against GSA schedules, and orders against GWACS.

The Contracting Officer shall submit the request for review to the OSDDBU allowing 10 business days for the review process. The request for review will include the following: copies of the procurement request and the statement of work; the source list; and a statement of the reason(s) it cannot be set-aside. [Note the APAT requirement does not apply to NNSA.]

### **Small Business Program Managers**

Contracting activity small business program managers, designated by the Head of the Contracting Activity (HCA), should perform the following functions: (1) Participate in the planning of, and make recommendations as to set aside, for acquisitions over \$100,000. The review process should address 8(a), HUBZone small business, small disadvantaged business, small business, service-disabled veteran-owned small business, and women-owned small business concerns; (2) Conduct the review before the issuance of the solicitation and complete the DOE Form 4220.2, Section 8(a)/Small Business Set-Aside Review; (3) Maintain copies of all completed DOE Form 4220.2, Section 8(a)/Small Business Set-Aside Review to the Small Business Program Manager for all requirements exceeding \$1,000,000 [\$100,000 applies to NNSA]; and (4) Maintain liaison with the small business community.

### **Contract Bundling**

The consolidation of smaller contracts that have been performed, or could have been performed, by small business concerns into a single contract awarded to a large business may have detrimental effects on some small businesses. As a consequence, Congress enacted legislation to regulate the consolidation of contracts. If contract consolidation is otherwise meritorious, such consolidated procurement should be awarded to the maximum extent practicable to small



business as specified in FAR Subpart 19.5. By definition, consolidated contracts awarded to small businesses are not bundled contracts. Likewise, M&O contracts are not bundled contracts. If a consolidated procurement is not set aside for small business, the Contracting Officer should rethink the acquisition strategy.

FAR 2.101 defines contract bundling as, "Consolidating two or more requirements for supplies or services, previously provided or performed under separate smaller contracts, into a solicitation for a single contract that is likely to be unsuitable for award to a small business concern due to- (i) The diversity, size, or specialized nature of the elements of the performance specified; (ii) The aggregate dollar value of the anticipated award; (iii) The geographical dispersion of the contract performance sites; or (iv) Any combination of the factors described in paragraphs (i), (ii), and (iii) of this definition." "Separate smaller contract" as used in this definition, means a contract that has been performed by one or more small business concerns or that was suitable for award to one or more small business concerns. "Single contract" as used in this definition, includes multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources (see FAR 16.504(c)); and an order placed against an indefinite quantity contract under a Federal Supply Schedule contract; or task-order contract or delivery-order contract awarded by another agency (i.e., Governmentwide acquisition contract or multi-agency contract). This definition does not apply to a contract that will be awarded and performed entirely outside of the United States.

Contracting activities are required to coordinate with the SBA Procurement Center Representative (SBA-PCR) on acquisition strategies or plans contemplating awards at or above \$5,000,000.

Program offices proposing to bundle a contract must quantify identified benefits and explain how their impact would be measurably substantial. Reduction of administrative or personnel costs alone is not sufficient justification for bundling unless the cost savings are expected to be at least 10 percent of the estimated contract value (including options) of the bundled requirements if the value is \$75 million or less; or 5 percent of the estimated contract value (including options), if the value exceeds \$75 million.

If the proposed acquisition strategy involves substantial bundling (i.e., any bundling that results in a contract with an average annual value of \$5 million or more), the Contracting Officer must include the following in acquisition strategy documentation: (1) the specific measurably substantial benefits or the criticality of bundling to the Department's mission; and (2) plans to preserve and promote small business participation as prime contractors and efforts to include small businesses as subcontractors. Plans to preserve and promote small business participation in a bundled contract might include teaming by small business for the prime contract and may include the following: a factor to evaluate past performance under previous subcontracting plans; and inclusion of the clause at 52.219-10, Incentive Subcontracting Program in the resulting contract.

The APAT has been designated as the Department's focal point for the review of bundled acquisitions, excluding NNSA. DOE program offices intending to proceed with a bundled procurement must submit the acquisition to the Team for review to ensure conformance with the statutory requirements regarding bundling, and to identify ways to maximize the participation of small businesses in the procurement. Should the Team determine that the proposed bundling of a contract is not necessary and there is no agreement between the program office and the Team

about the need to bundle, the matter will be referred to the Deputy Secretary through the HCA and Senior Procurement Executive.

The Deputy Secretary, without power of delegation, may determine that bundling is necessary and justified if: (1) the expected benefits do not meet the thresholds identified in this section, but are critical to mission success; and (2) the acquisition strategy provides for maximum practicable participation by small business concerns.

## **Part II. Subcontract Awards to Small Business**

HCA's must ensure that purchasing systems of contractors for the management and operation of major sites and facilities include small business outreach programs. Contracting Officers shall ensure: (1) that all M&O contractors, except small businesses, with contracts over \$500,000 (\$1 million if construction) have a small business subcontracting plan in place that has aggressive small business goals and (2) that subcontract reports, Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and (SF) 295, Summary Subcontract Report, are submitted in a timely and accurate fashion reporting the actual small business achievements. Additionally, Contracting Officers, in consultation with Small Business Program Managers, shall meet periodically with directors of contractor purchasing to review the status of the contractor's performance against its small business subcontracting plan.

### **A. SUBCONTRACTING PLANS**

Every subcontracting plan should, at a minimum, support achievement of the agency-wide goals negotiated with the SBA. Subcontracting plans reflecting less than the agency-wide goals must be approved at the HCA level with a copy of the justification forwarded to the OSDDBU. [Note this requirement does not apply to NNSA.] The Small Business Program Manager should review all subcontracting plans prior to acceptance. Small Business Program Managers should review, prior to submission through the Subcontracts Reporting System (SRS), and maintain copies of the SF 294 and SF 295.

### **B. SUBCONTRACTING PROCEDURES:**

#### **8(a) Pilot Program**

Contractors responsible for the management or operation of sites and facilities are authorized to award subcontracts with a value of \$5 million or less for manufacturing NAICS codes and \$3 million or less for all other acquisitions on a noncompetitive basis to firms certified as participants by the SBA under its 8(a) program. Contractors may also reserve for competition among 8(a) firms requirements in excess of those thresholds. The contractor shall assure that awards are made at fair market prices and are identified as awards to 8(a) firms and Small Disadvantaged Businesses (SDBs) under the reporting provisions of the Small Business Subcontracting Plan clause. A special effort may be made to identify and make awards to 8(a) firms in HUBZones. If such a program is instituted, the contractor shall assure that awards are made at fair market prices.

### **HUBZone Set-Aside**

*Awards to HUBZone 8(a) Firms.* For procurements under \$3 million (\$5 million for manufacturing NAICS codes) where an 8(a) certified firm can be identified and award can be made at a fair market price, an award may be made noncompetitively to a HUBZone 8(a). If the procurement is valued in excess of \$3 million (\$5 million for manufacturing) and two more HUBZone 8(a) firms can be identified, the procurement may be set aside for competition among HUBZone 8(a) firms.

Contractors responsible for the management and operation of DOE sites and facilities are authorized to use HUBZone set-aside and HUBZone sole source procurement techniques in the award of subcontracts under conditions similar to those applicable to the award of Federal prime contracts.

### **Women-Owned Small Business Evaluation Preference**

Contractors responsible for the management and operation of sites and facilities are authorized to provide for an evaluation criterion that reflects a preference in the award of subcontracts to firms that propose to make significant use of women-owned small business (WOSB) concerns in the performance of the proposed subcontract.

### **Discretionary Set-Asides**

Contractors responsible for the management and operation of sites and facilities are authorized to set aside purchases at any dollar value for award to small businesses and to make purchases valued up to \$50,000 [\$100,000 for NNSA contractors] on a sole source basis to small businesses. If such programs are instituted, the contractor shall assure that awards are to be made at fair market prices.

### **DOE Mentor-Protégé Program**

Contracting Officers should encourage prime contractors to enter into Mentor-Protégé agreements with small businesses. DOE regulations that provide for a Mentor-Protégé Program can be found at DEAR 919.70. The Department's Mentor-Protégé Program seeks to foster long-term business relationships between small business entities and prime contractors, and to increase the overall number of small business entities that receive contract and subcontract awards.

Mentors recognized under the DOE Mentor-Protégé Program are authorized, subject to the best commercial practices and procedures required by DEAR 970.4402-2(d), to award noncompetitive subcontracts, of any dollar value, to their Protégés. Further, other site and facilities management contractors may award noncompetitive subcontracts to a Protégé of another DOE Mentor contractor if those awards are made at fair market prices. OSDDBU maintains a current listing of active Mentor-Protégé agreements.

### **Part III. Other Considerations**

#### **A. SECURITY CLEARANCES**

Much of the Department's work is classified and performance of that work requires cleared facilities and staff. For many small businesses, obtaining appropriate clearances may require background checks that often take three months to complete; whereas, large businesses are more likely to have personnel and facilities that already have the necessary security clearances. Contracting Officers should consider the following when processing procurements that involve classified work:

Security personnel should be consulted when preparing draft statements of work that may involve security requirements to assure that the security requirements are not overstated.

Solicitations should be issued and the award made sufficiently in advance to allow for the processing of required security clearances. The absence of existing personnel security clearances should not be the sole basis for denying an award. Offerors should be allowed a reasonable time for the workforce of the successful offeror to be cleared.

Solicitations that require security clearances could provide for the issuance of a notice to proceed when the security requirements have been satisfied.

Solicitations that require security clearances for the successful offeror should include a statement that employees who have been cleared by any Federal agency may meet the security requirements of the contract.

If the personnel security clearance required is level "L" (i.e., secret) it may be that a full background investigation would not be required, presenting no particular obstacle to participation by small businesses. If the clearance required were level "Q" (i.e., top secret, or higher) a background investigation would be required. Security directives provide for expedited background investigation where a level "Q" clearance is required.

Personnel security clearances may be expedited if the time required for standard processing will result in serious delay or interference in an operation or project essential to the Department's mission. In certain circumstances (e.g., urgent need) and under certain conditions (e.g., completion of psychological, drug, and polygraph tests), an interim clearance may be granted while a background investigation is being conducted.

Further information is contained in a pamphlet, *DOE's Security Requirements for Small Business Contractors*. It can be found at the bottom of the following web site:

<http://www1.pr.doe.gov/small.html>

## B. SMALL BUSINESS STATISTICS

### Collecting and Reporting Small Business Contracting Information

The systems for collecting and reporting small business award information are the Procurement and Assistance Data System (PADS - *DOE prime contract award data*), and the Subcontract Reporting System (SRS - *prime contractor subcontracting award data*).

The accuracy of the statistics reported in these systems is vital to the credibility of the Department's performance in this area, which is continually monitored by Congress, the SBA, trade organizations, small business advocacy groups, and other entities.

### Improving the Accuracy of Small Business Information

HCAAs should assure that proper quality control systems are in place to ensure the accurate reporting of small business data.

HCAAs should include the accuracy of Federal contract data as a compliance standard for the contracting activities' Federal assessment program.

The Contracting Officer is responsible for taking all reasonable steps to validate an offeror's Small Business representation prior to any Federal prime contract award. [Note: NNSA Contracting Officers shall adhere to the FAR standard of self-certification.]

The Contracting Officer should refer to the SBA and the Office of the Inspector General any certification of small business status that is inaccurate and refer instances of misrepresentation of small business status to the DOE/NNSA Procurement Executive for consideration of suspension/debarment.

The Contracting Officer is responsible for ensuring that M&O contractors (1) establish reasonable controls to ensure small business subcontracting data reports are accurate, including data submissions to electronic data collection systems; (2) maintain current and accurate listings of small business suppliers to the extent such listings are used; (3) obtain certification of size status; (4) conform to the list of exclusions from subcontract reporting in the SBA document, *Goaling Guidelines for the Small Business Preference Programs for Prime and Subcontract Federal Procurement Goals & Achievements*, as provided by OSDDBU; and (5) refer to the Contracting Officer instances of small business status misrepresentation.

## C. CENTRAL CONTRACTOR REGISTRATION DATABASE

The Federal Government maintains an interactive web site to access the Central Contractor Registration (CCR) program at <http://www.ccr.gov/>. CCR is a small businesses database of with advanced search capabilities. It allows firms to register their company profile and allows Contracting Officers to search the database with results stratified by numerous qualifiers (e.g., WOSB, SDB, 8(a), HUBZone). The qualifiers can be combined to narrow the search results to very specific categories of small businesses having very specific qualifications. Contractors may also use the search capabilities of CCR.

#### **D. SECRETARY'S SMALL BUSINESS AWARDS**

DOE recognizes the outstanding small business achievements of its departmental elements, prime contractors and other organizations. Colleagues and headquarters personnel nominate outstanding individuals to receive the "Secretary's Small Business Awards." The awards program was established in 1978. The following awards are presented annually:

##### **Element Awards:**

- (1) Award for the element that breaks out the greatest percent of small business awards from an existing facility management contract.
- (2) Award for the element with the greatest percentage increase in awards to small business from the prior year.
- (3) Award for the element with the highest percentage of diversity in its small business awards.

##### **M&O Awards:**

- (1) Award for the M&O with the most significant small business teaming arrangements.
- (2) Award for the M&O with the greatest percentage increase in awards to small business from the past year.
- (3) Award for the M&O with the highest percentage of diversity in its small business awards.

##### **Small Business Program Manager Awards:**

- (1) Award for the SB program manager who has made the most progress in promoting small business contracting at the HQ level.
- (2) Award for the SB program manager who has made the most progress in promoting small business contracting at the field level.
- (3) Award for the SB program manager who has made the most progress in promoting small business contracting at the M&O level.

##### **Mentor-Protégé Award:**

Award for the most outstanding mentor, protégé or mentor-protégé team.



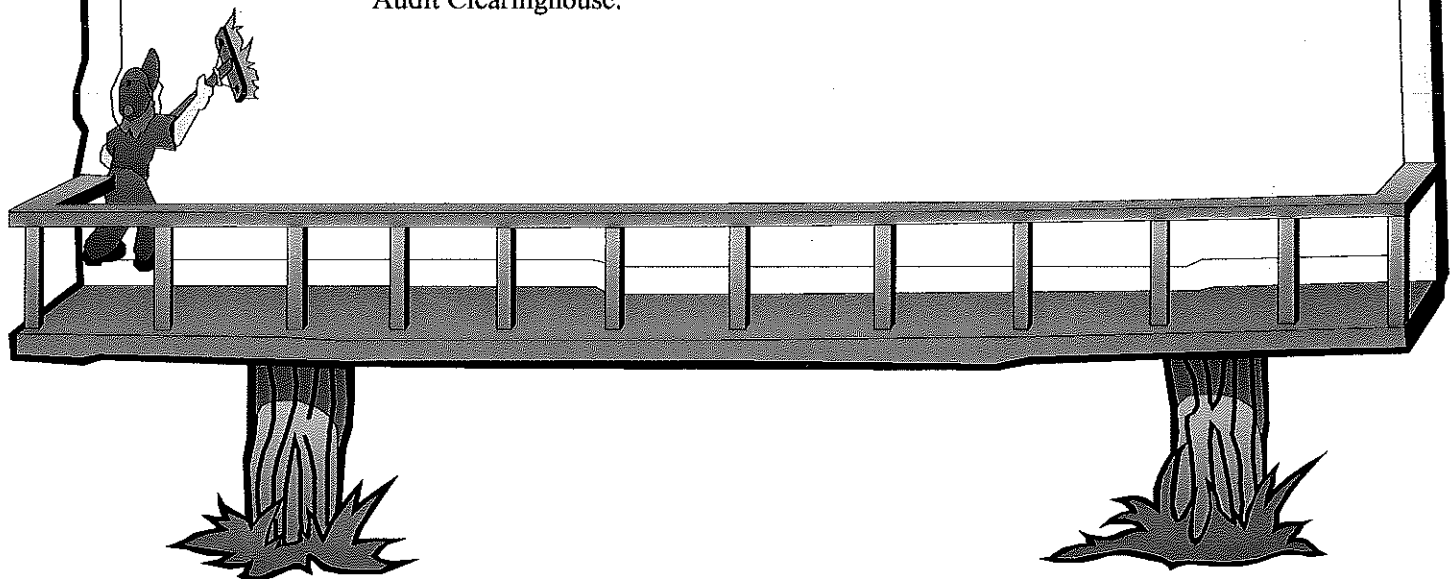
# **HEADQUARTERS POLICY FLASH**

## **POLICY FLASH 2004-15**

DATE: May 11, 2004  
TO: Procurement Directors  
FROM: Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

SUBJECT: **Financial Assistance Letter 2004-04, OMB Circular A-133 Audits and the Federal Audit Clearinghouse**

SUMMARY: This Policy Flash distributes a Financial Assistance Letter (FAL) which provides guidance on audits required under OMB Circular A-133 and use of the Federal Audit Clearinghouse.



## **POLICY FLASH 2004-15**

The FAL provides Contracting Officers (COs) and grants personnel guidance regarding the use of A-133 audits and the Federal Audit Clearinghouse (FAC). The purpose of the FAL is to ensure that 1) potential recipients are screened prior to award for submission of the audit and for qualified or adverse opinions in the audit; 2) audits with questioned items are reviewed and management decisions issued; and 3) that submission of audits and questioned costs are reviewed during the closeout process.

Please contact Jackie Kniskern at (202) 586-8189 or via email at [jacqueline.kniskern@pr.doe.gov](mailto:jacqueline.kniskern@pr.doe.gov) with any questions on the new requirement.



Michael Fischetti, Acting Director  
Office of Procurement  
and Assistance Policy

cc: FAAC Members



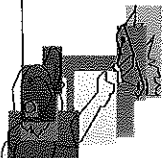


# **HEADQUARTERS POLICY FLASH**

## **POLICY FLASH 2004-16**

DATE: May 21, 2004  
TO: Procurement Directors  
FROM: Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

SUBJECT: **Office of Federal Procurement Policy (OFFP) Determination of  
Executive Compensation Benchmark Amount**



SUMMARY: The Administrator of OFFP has determined that the "benchmark compensation amount," allowable under government contracts during a contractors' fiscal year (FY) 2004, is \$432,851. This determination was made pursuant to Section 39 of the OFFP Act (41 U.S.C. 435) and was published in the Federal Register, Vol. 69, No. 94, May 14, 2004.

## **FLASH 2004-16**

This "benchmark compensation amount" is to be used for contractor FY 2004 and subsequent contractor FYs unless and until revised by OFFP. This benchmark compensation amount applies to contract costs incurred after January 1, 2004, under covered contracts of both defense and civilian procurement agencies, as specified in Section 808 of Pub. L. 105-85.

This "benchmark compensation amount" supersedes the amount cited in Headquarters Policy Flash 2003-19, August 26, 2003.

Applicability of the FAR to M&O contracts is addressed at 48 CFR 31.205-6(p) and 48CFR 970.3102-05-6(p), respectively.

For questions related to this Flash, contact Terry Sheppard at (202) 586-8193 or via e-mail at [terry.sheppard@hq.doe.gov](mailto:terry.sheppard@hq.doe.gov)



Michael Fischetti, Acting Director  
Procurement and Assistance  
Management Policy

Attachment

Cc: PPAG Members

**Federal Register** notice is to announce the June 2004 meeting of the committee.

**DATES:** The committee will meet on June 30 through July 1, 2004. On June 29, the MACOSH work groups will meet from 8 a.m. until 5 p.m.; on June 30, the full committee will meet from 8:30 a.m. until 5 p.m.; on July 1, the full committee will meet from 8:30 a.m. until approximately 4:30 p.m.

**ADDRESSES:** The committee will meet at the Holiday Inn on the Hill, 415 New Jersey Avenue, NW., Washington, DC 20001; phone (202) 638-1616; fax: (202) 638-0707.

Mail comments, views, or statements in response to this notice to Jim Maddux, Director, Office of Maritime, OSHA, U.S. Department of Labor, Room N-3609, 200 Constitution Avenue, NW., Washington, DC 20210; phone: (202) 693-2086; FAX: (202) 693-1663.

**FOR FURTHER INFORMATION CONTACT:** For general information about MACOSH and this meeting: Jim Maddux, Director, Office of Maritime, U.S. Department of Labor, Room N-3609, 200 Constitution Avenue, NW., Washington, DC 20210; phone: (202) 693-2086. For information about the submission of comments, and requests to speak: Vanessa L. Welch, Office of Maritime, OSHA, U.S. Department of Labor, Room N-3609, 200 Constitution Avenue, NW., Washington, DC 20210; Phone: (202) 693-2086. Individuals with disabilities wishing to attend the meeting should contact Vanessa L. Welch at (202) 693-2086 no later than June 17, 2004 to obtain appropriate accommodations.

**SUPPLEMENTARY INFORMATION:** All MACOSH meetings are open to the public. All interested persons are invited to attend MACOSH at the times and places listed above. This meeting will include presentations and discussions of OSHA's standard and guidance activities (including the proposed standard for chromium VI), maritime enforcement, alliances and partnerships, outreach activities, OSHA's homeland security/emergency preparedness efforts, and MACOSH work group reports. MACOSH has formed five work groups to deal with health issues, container safety, traffic safety, outreach, and safety culture. Each workgroup will meet on June 29, following separate meetings for the shipyard and longshoring industries.

**Public Participation:** Written data, views or comments for consideration by MACOSH on the various agenda items listed above may be submitted to Vanessa Welch at the address listed above. Submissions received by June 17, 2004, will be provided to committee members and will be included in the

record of the meeting. Requests to make oral presentations to the Committee may be granted as time permits. Anyone wishing to make an oral presentation to the Committee on any of the agenda items listed above should notify Vanessa Welch by June 4, 2004. The request should state the amount of time desired, the capacity in which the person will appear, and a brief outline of the content of the presentation.

**Authority:** John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice under the authority granted by 6(b)(1) and 7(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655, 656) the Federal Advisory Committee Act (5 U.S.C. App. 2), and 29 CFR part 1912.

Signed at Washington, DC, this 11th day of May, 2004.

John L. Henshaw,

Assistant Secretary of Labor.

[FR Doc. 04-11006 Filed 5-13-04; 8:45 am]

BILLING CODE 4510-26-M

## OFFICE OF MANAGEMENT AND BUDGET

### Office of Federal Procurement Policy

#### Determination of Executive Compensation Benchmark Amount Pursuant to Section 808 of Pub. L. 105-85

**AGENCY:** Office of Federal Procurement Policy, OMB.

**ACTION:** Notice.

**SUMMARY:** The Office of Management and Budget (OMB) is hereby publishing the attached memorandum to the heads of executive departments and agencies concerning the determination of the maximum "benchmark" compensation amount that will be allowable under government contracts during contractors' FY 2004—\$432,851. This determination is required to be made pursuant to Section 808 of Pub. L. 105-85. It applies equally to both defense and civilian procurement agencies.

**FOR FURTHER INFORMATION CONTACT:** Rein Abel, Office of Federal Procurement Policy, on (202) 395-3254.

Joshua B. Bolten,  
Director.

#### Memorandum for the Heads of Executive Departments and Agencies

**Subject:** Determination of Executive Compensation Benchmark Amount Pursuant to Section 808 of Pub. L. 105-85.

This memorandum sets forth the "benchmark compensation amount" as required by Section 39 of the Office of Federal Procurement Policy (OFPP) Act (41

U.S.C. 435), as amended. Under Section 39, the "benchmark compensation amount" is "the median amount of the compensation provided for all senior executives of all benchmark corporations for the most recent year for which data is available." The "benchmark compensation amount" established as directed by Section 39 limits the allowability of compensation costs under government contracts. The "benchmark compensation amount" does not limit the compensation that an executive may otherwise receive.

Based on a review of commercially available surveys of executive compensation and after consultation with the Director of the Defense Contract Audit Agency, we have determined pursuant to the requirements of Section 39 that the benchmark compensation amount for contractor Fiscal Year 2004 is \$432,851. This benchmark compensation amount is to be used for contractor Fiscal Year 2004, and subsequent contractor fiscal years, unless and until revised by OMB. This benchmark compensation amount applies to contract costs incurred after January 1, 2004, under covered contracts of both the defense and civilian procurement agencies as specified in Section 808 of Pub. L. 105-85.

Questions concerning this memorandum may be addressed to Rein Abel, Office of Federal Procurement Policy, on (202) 395-3254.

Joshua B. Bolten,  
Director.

[FR Doc. 04-10925 Filed 5-13-04; 8:45 am]

BILLING CODE 3110-01-P

## MILLENNIUM CHALLENGE CORPORATION

[FR 04-06]

### Notice of Report on the Selection of Eligible Countries for FY 2004

**AGENCY:** Millennium Challenge Corporation.

**SUMMARY:** Section 608(d) of the Millennium Challenge Act of 2003, Pub. L. 108-199 (Division D) requires the Millennium Challenge Corporation to publish a report that lists the countries determined by the Board of Directors of the Corporation to be eligible for assistance for Fiscal Year 2004. The report is set forth below.

**Report:** The Act authorizes the provision of assistance to countries that enter into compacts with the United States to support policies and programs that advance the prospects of such countries to achieve lasting economic growth and poverty reduction. The Act requires the Millennium Challenge Corporation ("MCC") to take a number of steps to determine the countries that, based on their demonstrated commitment to just and democratic governance, economic freedom and investing in their people, will be eligible

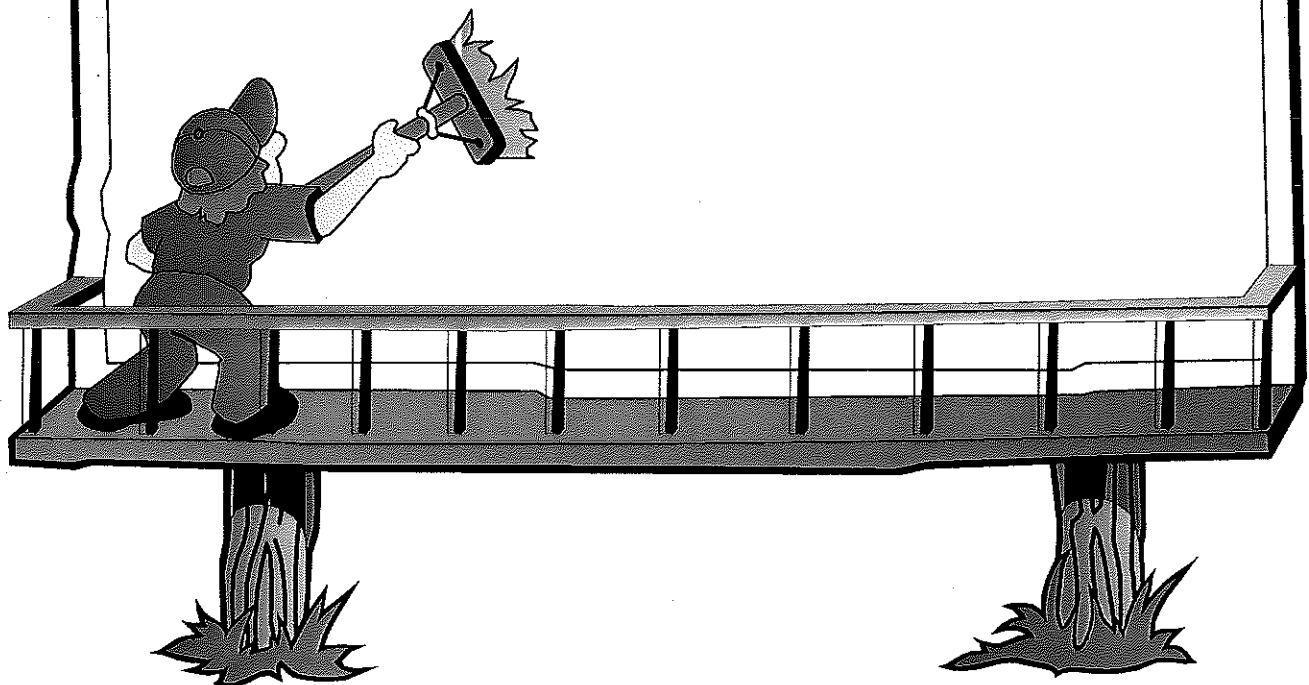


# **Headquarters Policy Flash**

**FLASH 2004-17**

**DATE:** May 25, 2004  
**TO:** Procurement Directors  
**FROM:** Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management  
**SUBJECT:** **Federal Acquisition Circulars (FAC) 2001-22 and 2001-23, Final Rules Amending the FAR and an Interim Rule with Request for Comments**

**SUMMARY:** This Policy Flash transmits summary information regarding FAC 2001-22 and FAC 2001-23 published in the Federal Register at 69 FR 17740 on April 5, 2004 and 69 FR 25274 on May 5, 2004, respectively. The rulemakings amend the FAR to simplify and clarify certain procedures, as well as require the implementation of new policy and procedure.



**FLASH 2004-17**  
**May 25, 2004**

**Federal Acquisition Circular (FAC) 2001-22**

The following item is available via the internet at  
<http://www.acqnet.gov/far/FAC/fac2001-22.pdf>

**Item 1 - Government Property Disposal (FAR Case 1995-013)**

*Effective Date: May 5, 2004*

This final rule amends FAR Part 1, Federal Acquisition Regulations System, Part 2, Definitions of Words and Terms, Part 8, Required Sources of Supplies and Services, Part 45, Government Property, Part 49, Termination of Contracts, Part 52, Solicitation Provisions and Contract Clauses and Part 53, Forms. The rule will simplify procedures, reduce record keeping, and eliminate requirements related to the disposition of Government property in the possession of contractors.

**Item 2 –General Provisions of the Cost Principles (FAR Case 2001-034)**

*Effective Date: May 5, 2004*

The final rule amends FAR Part 2, Definitions, and Part 31, Contract Cost Principles and Procedures. The rule –

- Revises the cost principles by improving clarity and structure, and removing unnecessary and duplicative language. These changes update contract cost principles and procedures to bring them more in line with the Generally Accepted Accounting Principles (GAAP), acquisition reform initiatives, and practical experience gained from the implementation of contract cost principles;
- Adds the definition of “direct cost” to insure consistency with the terminology used in the cost accounting standards (CAS);
- Revises the definition of “indirect costs” to reflect CAS consistency.

**Item 3 – Unique Contract and Order Identifier Numbers (FAR Case 2002-025)**

*Effective Date: April 5, 2004*

This final rule, converted from an interim rule without change, requires Federal agencies to assign a unique procurement instrument identifier (PIID) for every contract, purchase order, basic ordering agreement (BOA), basic agreement, and blanket purchase agreement (BPA) reported to the Federal Procurement Data System. This rule amends FAR Part 4, Administrative Matters.

**FLASH 2004-16**  
**May 13, 2004**

**Item 4 – Unsolicited Proposals (FAR Case 2002-027)**

*Effective Date: May 5, 2004*

This final rule amends FAR Part 15, Contracting by Negotiation, and implements new requirements relative to the submission, receipt, evaluation, and acceptance or rejection of unsolicited proposals. The rule-

- Requires that a valid unsolicited proposal not address a previously published agency requirement;
- Provides that the agency must determine before starting a complete evaluation of the proposal, that sufficient cost or price related data are present for evaluation; and
- Provides that the agency verify that the proposal has overall scientific, technical, or socioeconomic merit.

**Item 5 – New Mexico Tax – United States Missile Defense Agency (FAR Case 2003-020)**

*Effective Date: April 5, 2004*

This final rule amends the FAR to incorporate the Defense Missile Agency as a participating agency within the terms and conditions stipulated in FAR Part 29, Taxes. The Missile Defense Agency is included as part of a list of agencies that have an agreement with the State of New Mexico to eliminate the double taxation of Government cost-reimbursement contracts when contractors and their subcontractors purchase tangible personal property to be used in the performance of services in New Mexico and the title of the property passes to the United States upon delivery.

**Item 6 – Technical Amendments**

The amendment makes editorial changes to FAR 52.212-5(b)(24) and 52.213-4(a)(1)(iv).

**FLASH 2004-17**  
**May 25, 2004**

**Federal Acquisition Circular (FAC) 2001-23**

The following item is available via the internet at  
<http://www.acqnet.gov/far/FAC/fac2001-23.pdf>

**Procurement Program for Service Disabled Veteran-Owned Small Business  
Concerns (FAR Case 2004-002)**

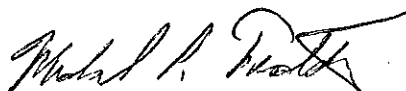
This is an interim rule with a request for comment which amends the FAR to implement a statutory set-aside and sole source procurement authority for service disabled veteran owned small business (SDVOSB). The rule provides that-

- The Contracting Officer may award a contract on the basis of competition restricted to the SDVOSB concern where it is expected that two or more firms will submit an offer and award can be made at a fair market price.
- A fair market award may be made of a sole source contract to the SDVOSB concern if there is not an expectation that two or more concerns will submit an offer and the contract price, including options, does exceed \$5 million for manufacturing or \$3 million otherwise.

The attached document provided by the Small Business Administration supplies information relative to the implementation of the Veterans Benefit Act of 2003. The above referenced FAR Case 2004-002 is that implementation. The document is a compilation of questions and answers to assist the reader in determining applicability.

Written comments to the interim rulemaking are due in this office on or before June 30, 2004. This will allow time to prepare a consolidated response to the General Services Administration, as necessary.

Questions concerning this Flash should be directed to Denise P. Wright on (202) 586-6217 or via e-mail at [Denise.Wright@hq.doe.gov](mailto:Denise.Wright@hq.doe.gov)



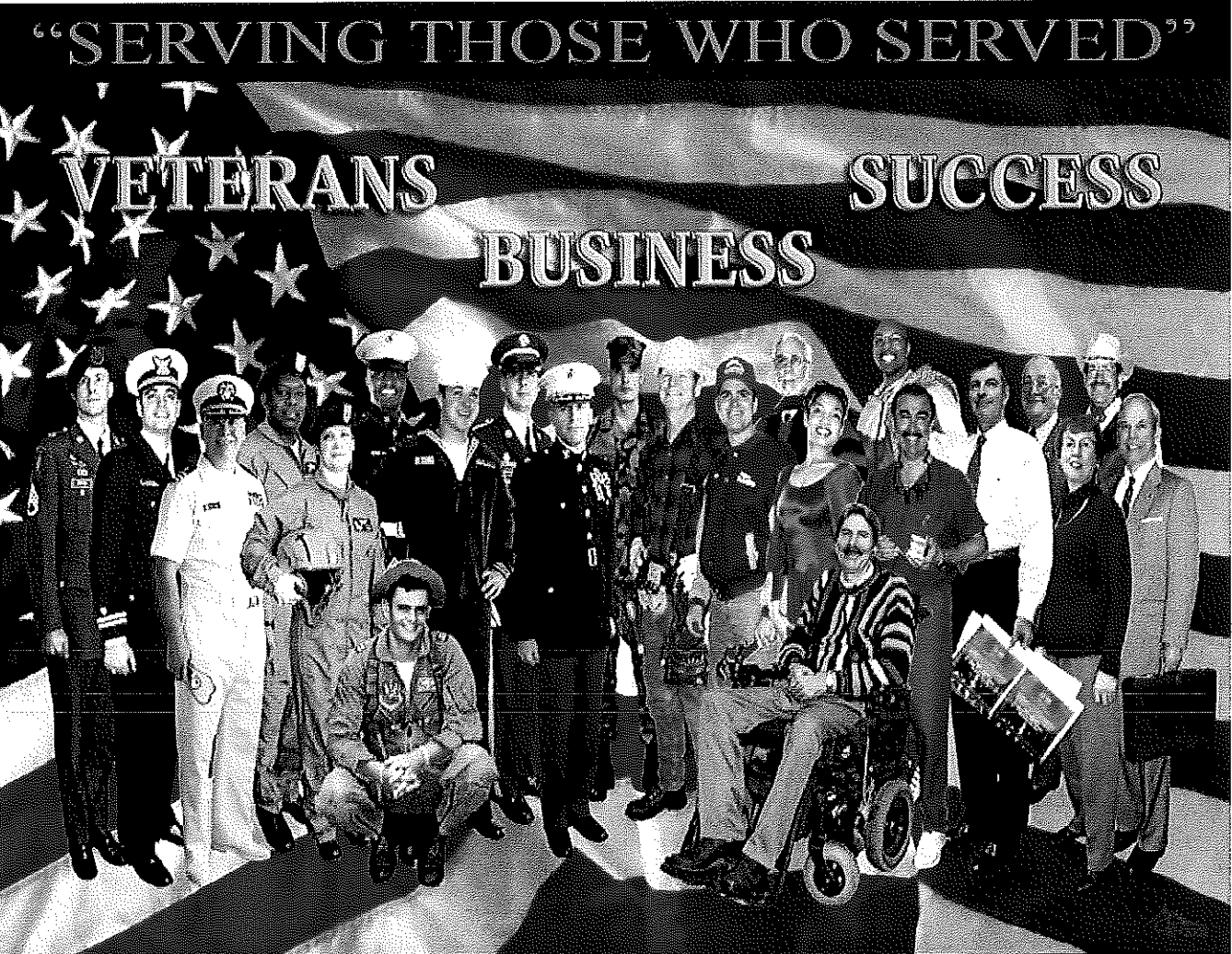
Michael P. Fischetti, Acting Director  
Office of Procurement and  
Assistance Policy

cc:  
PPAG Members

# Procurement Preferences for Small Business Concerns Owned or Controlled by Service-Disabled Veterans

**"SERVING THOSE WHO SERVED"**

**VETERANS BUSINESS SUCCESS**



**SBA** U.S. Small Business Administration: 1-800-ASK SBA; Email: [answerdesk@sba.gov](mailto:answerdesk@sba.gov)  
Office of Veterans Business Development; Phone: 202-205-6773; [www.sba.gov/VETS](http://www.sba.gov/VETS)



On December 16, 2003, the **Veterans Benefits Act of 2003** (Public Law 108-183) was enacted amending the Small Business Act (15 U.S.C. 631 et seq.) to establish a procurement program for Small Business Concerns owned and controlled by service-disabled veterans.

Section 308 of that law provides that contracting officers may award a sole source or set-aside contract to Service-Disabled Veteran Owned Small Business Concerns (SDVOSBCs), if certain conditions are met. Specifically, a contracting officer may award a sole source contract to any small business concern owned and controlled by service-disabled veterans if --

- such concern is determined to be a responsible contractor with respect to performance of such contract opportunity and the contracting officer does not have a reasonable expectation that 2 or more small business concerns owned and controlled by service-disabled veterans will submit offers for the contracting opportunity;
- the anticipated award price of the contract (including options) will not exceed –
  - \$5.0M in the case of a contract opportunity assigned a North American Industry Classification System code for manufacturing; or
  - \$3.0M in the case of any other contract opportunity;
- in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price.

Additionally, a contracting officer may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price.

### **Frequently Asked Questions**

**Q. Is a formal certification required from the SBA, or any other federal agency, to participate in the SDVOSBC procurement program?**

No. A SDVOSBC will be able to “self-represent” its status as a SDVOSBC to the contracting activity as part of its offer. However, for sole source procurements, the SBA or the contracting officer may protest the proposed awardee’s service-disabled veteran status, and for competitive set-asides, any interested party may protest the apparent successful offeror’s SDVOSBC status.

**Q. What are the basic requirements for business concerns to participate in the SDVOSBC procurement program?**

- The SDVOSBC must be a small business;
- 51 percent of the SDVOSBC must be unconditionally and directly owned by one or more service-disabled veterans; and
- The management and daily business operations of the SDVOSBC must be controlled by one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or a permanent caregiver of such veteran).

**Q. What is SBA's definition of a small business concern?**

A small business is a concern that is organized for profit, with a place of business in the United States, and which operates primarily within the United States or makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor. Further, the concern cannot be dominant in its primary field, on a national basis. Finally, the business concern's size can not exceed the size standard established for its industry in the North American Industrial Classification System (NAICS) code. The most common size standards are as follows:

- **Construction** – General building and heavy construction contractors have a size standard of \$28.5 million in average annual receipts. Special trade construction contractors have a size standard of \$12 million.
- **Manufacturing** – For approximately 75 percent of the manufacturing industries, the size standard is 500 employees. A small number have a 1,500 employee size standard and the balance have a size standard of either 750 or 1,000 employees.
- **Mining** – All mining industries, except mining services, have a size standard of 500 employees.
- **Retail Trade** – Most retail trade industries have a size standard of \$6 million in average annual receipts. A few, such as grocery stores, department stores, motor vehicle dealers and electrical appliance dealers, have higher size standards. None are above \$24.5 million.
- **Services** – For the service industries, the most common size standard is \$6 million in average annual receipts. Computer programming, data processing and systems design have a size standard of \$21 million. Engineering and architectural services have different size standards, as do a few other service industries. The highest annual receipts size standard in any service industry is \$30 million. Research and development and environmental remediation services are the only service industries with size standards stated in number of employees.

- **Wholesale Trade** – When acting as a dealer on Federal contracts the small business size standard is 500 employees. In addition, on procurement set-aside for small business over \$25,000, the firm must deliver the product of a small domestic manufacturer, as set forth in SBA's non-manufacturer rule, unless waived by the SBA for a particular class of product. However, for those procurements made under the Simplified Acquisition Procedures of the FAR and where the purchase does not exceed \$25,000, the non-manufacturer may deliver the goods of any domestic manufacturer.
- **Other Industries** – Other industry divisions include: Agriculture; transportation, communications, electric, gas, and sanitary services; and finance, insurance and real estate. Because of wide variation in the structure of the industries in these divisions, there is no common pattern of size standards. For specific size standards refer to the size regulations in 13 CFR § 121.201 or the table of small business size standards.

**Q. Who is a service-disabled veteran?**

A service-disabled veteran is a person who served in the active military, naval, or air service, and who was discharged or released under conditions other than dishonorable, and whose disability was incurred or aggravated in line of duty in the active military, naval, or air service.

The definitions of the terms "veteran" and "service-disabled veteran" are derived from Title 38 U.S.C. § 101.

**Q. What percentage of a concern must be owned by a service-disabled veteran for it to be qualified as a SDVOSBC?**

At least 51 percent of the small business concern must be directly and unconditionally owned by service-disabled veteran(s).

In the case of a small business concern which is a partnership, at least 51 percent of every class of partnership interest must be unconditionally owned by one or more service-disabled veterans. The ownership must be reflected in the small business concern's partnership agreement.

In the case of a small business concern which is a limited liability company, at least 51 percent of each class of member interest must be unconditionally owned by one or more service-disabled veterans.

In the case of a small business concern which is a corporation, at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more service-disabled veterans.

Stock options, held by non service-disabled veterans, are given present effect. Any unexercised stock options or similar agreements held by service-disabled veterans will be disregarded. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-service-disabled veterans will be treated as exercised.

**Q. Who does SBA considered to control a SDVOSBC?**

Control is not the same as ownership, although both may reside in the same person. Control is regarded as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations. A SDVOSBC's management and daily business operations must be conducted by one or more service-disabled veterans, or in the case of a veteran with a permanent and severe disability, the spouse or permanent caregiver of such veteran.

Service-disabled veterans managing the service-disabled veteran owned small business concern must have managerial experience of the extent and complexity needed to run the service-disabled veteran owned small business. However, a service-disabled veteran individual need not have the technical expertise or possess a required license to control a service-disabled veteran owned small business concern if he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.

Finally, a service-disabled veteran, or in the case of a veteran with a permanent and severe disability, the spouse or permanent caregiver of such veteran, must hold the highest officer position in the concern.

- Control over a partnership – in the case of a partnership, one or more service-disabled veterans, or in the case of a veteran with a permanent and severe disability, the spouse or permanent caregiver of such veteran, must serve as general partners with control over all partnership decisions.
- Control over a limited liability company – in the case of a limited liability company, one or more service-disabled veterans, or in the case of a veteran with a permanent and severe disability, the spouse or permanent caregiver of such veteran, must serve as managing members with control over all decisions of the limited liability company.
- Control over a corporation – in the case of a corporation, one or more service-disabled veterans, or in the case of a veteran with a permanent and severe disability, the spouse or permanent caregiver of such veteran, must control the Board of Directors.

**Q. How does SBA view the management and daily business operations of a SDVOSBC controlled by the spouse or permanent caregiver of a veteran with permanent and severe disability?**

The management and daily business operations of an SDVOSBC may be controlled by a spouse or permanent caregiver (the spouse, or an individual, 18 years of age or older, who is legally designated, in writing, to undertake responsibility for managing the well-being of the service-disabled veteran) of a service-disabled veteran with a permanent and severe disability (a veteran with a service-connected disability that has been determined by the U.S. Department of Veterans Affairs to have a permanent and total disability for purposes of receiving disability compensation or a disability pension).

**Q. What documentation should I have to confirm my status as a service-disabled veteran?**

Contact the National Archives and Records Administration at <http://www.archives.gov> to request certified copies of your Department of Defense discharge papers that demonstrates a service-incurred disability. Additionally, if you have been adjudicated by the Department of Veterans Affairs as having a service-connected disability, contact your local VA regional office for appropriate documentation.

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### **Available Procurement Assistance for SDVOSBC**

- Register your SDVOSBC in the **Central Contractor Registration** data base at <http://www.ccr.gov>
  - **Procurement Technical Assistance Program (PTAP)**, administered by the Defense Logistics Agency, on behalf of the Secretary of Defense, provide assistance to business firms in marketing products and services to the Federal, state and local governments. Web Site: <http://www.dla.mil/db/procurem.html>
  - **SBA's Procurement Center Representatives**, located in area offices, review and evaluate the small business programs of federal agencies and assist small businesses in obtaining federal contracts and subcontracts. Web Site: <http://www.sba.gov/GC/pcr.html>
  - **SBA's Commercial Market Representatives (CMR's)**, located in area offices, conduct compliance reviews of prime contractors, counsel small businesses on how to obtain subcontracts, conduct matchmaking activities to facilitate subcontracting to small business, and provide orientation and training on the Subcontracting Assistance Program for both large and small businesses. Web Site: <http://www.sba.gov/GC/indexcontacts-cmrs.html>
  - **Offices of Small & Disadvantaged Business Utilization (OSDBU)** OSDBU's were established under the authority of Public Law 95-507. They are responsible for promoting the use of small, small disadvantaged, (8a), HUBZone, veteran-owned, service disabled veteran-owned small firms, and women-owned small businesses in compliance with federal laws, regulations, and policies. They also assist such firms in obtaining contracts and subcontracts with federal agencies and their prime contractors. Web Site: <http://www.osdbu.gov/Listofmembers.html>
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**Points of Contact for Assistance and Guidance:**

SBA's Office of Veterans Business Development -- 202-205-6773  
Web Site -- <http://www.sba.gov/VETS/>

**SBA's Veterans Business Outreach Centers:**

- The Research Foundation of the State University of New York

Mike Ross  
41 State Street  
Albany, NY 12246  
Phone: 518-443-5398 ext. 163  
Fax: 518-443-5275  
Email: [Rosssdm@nyssbdc.org](mailto:Rosssdm@nyssbdc.org)  
Webpage: [www.nyssbdc.org/vboc](http://www.nyssbdc.org/vboc)

- The University of West Florida in Pensacola

Douglas Davis  
GCCC/SBDC/VBOC  
2500 Minnesota Avenue  
Lynn Haven, FL 32444  
Phone: 1-800-542-7232 or 850-271-1108  
Fax: 850-271-1109  
Email: [vboc@knology.net](mailto:vboc@knology.net)  
Webpage: <http://www.vboc.org>

- The University of Texas - Pan American

Jessica Lopez  
1201 West University Drive  
Edinburg, TX 78539-2999  
Phone: 956-292-7535  
Fax: 956-316-2612  
Email: [vboc@panam.edu](mailto:vboc@panam.edu)  
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Vietnam Veterans of California – VBOC

Indria Gillespie

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Sacramento, California 95823

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Fax: 916-393-8389

Email: [igillespie@vboc-ca.org](mailto:igillespie@vboc-ca.org)

Webpage: <http://www.vboc-ca.org>

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**SBA's District Office Veterans Business Development Officers:**

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VACANT	Boston, MA 02222-1093	10 Causeway Street, Room 265	(617) 565-5567
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Thomas Schroeder	Montpelier, VT 05601-0605	P.O. Box 605	(802) 828-4422 ext. 204
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Richard Keffer	Buffalo, NY 14202	111 West Huron Street, Room 1311	(716) 551-5664
Frank Dito	New York, NY 10278	26 Federal Plaza, Room 3100	(212) 264-2846
Martin F. McHenry	Newark, NJ 07102	Two Gateway Center, 15th Floor	(973) 645-2427
David Brinck	Syracuse, NY 13202-2413	401 South Salina St, 5th Floor	(315) 471-9393 ext. 230
Ana Maria Vera	San Juan, PR 00918-2038	Citibank Tower 252 Ponce De Leon Ave Ste. 200	(787) 766-5422
Howard Garrity	Elmira, NY 14901	333 East Water Street, 4th floor	(607) 734-8130 ext. 30
Carl Christensen	Crofted St. Croix, VI 00820	Sunny Isle Professional Bldg, Suites 5 & 6	(340) 778-5380
Dan O'Connell	Albany, NY 12205	Chamber of Commerce 1 Computer Dr. So.	(518) 446-1118 ext. 231
Joe McDevitt	Philadelphia, PA 19107	900 Market Street, 5th Floor	(215) 580-2706
Stanley Karwacki	Baltimore, MD 21201-2525	10 South Howard Street, Suite 6220	(410) 962-6195 ext. 340
Donald Nemchick	Pittsburgh, PA 15212	700 River Avenue, Suite 510	(412) 322-6441
Leroy Harris	Richmond, VA 23240-0126	400 North 8th Street, Suite 1150	(804) 771-2400 ext. 132
Seth Jones	Washington, DC 20005	1110 Vermont Avenue, 9th Floor	(202) 606-4000 ext. 269
Joe McDevitt	McDevitt covers Wilkes-barre, PA	use Philadelphia, PA address tel. and fax no.	(215) 580-2706
William Durham	Charleston, WV 25301	405 Capital Street, Suite 412	(304) 347-5220
Robert Williamson	Wilmington, DE 19801-3011	824 North Market Street, Suite 610	(302) 573-6315
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Richard Hembree	Birmingham, AL 35211	801 Tom Martin Drive, Suite 201	(205) 290-7340 ext. 226
Elliott Cooper	Columbia, SC 29201	1835 Assembly Street, Room 358	(803) 765-5339
VACANT	Jackson, MS 39201	210 East Capitol Street, Suite 900	(601) 965-4378 ext. 241
Charles Atwood	Jacksonville, FL 32256-7504	7825 Baymeadows Way, Suite 100B	(904) 443-1951
Tommie Causey	Louisville, KY 40202	2900 West Broadway, Suite 3	(502) 574-1143
Frank Velasco	Miami, FL 33131	100 South Biscayne Boulevard, 7th floor	(305) 536-5521 ext. 122
Don Winters	Nashville, TN 37228	50 Vantage Way, Suite 201	(615) 736-5881 ext. 248
Gary Reed	Gulfport, MS 39501-1949	2909 13th Street, Suite 203	(228) 863-4449 ext. 14
Mitch De Mallie	Charlotte, NC 28210-2227	6302 Fairview Road, Suite 300	(704) 344-6590 ext. 1116
Steve Konkle	Chicago, IL 60661	500 W. Madison Street, Room 1250	(312) 886-4208
John Renner	Cleveland, OH 44114-2507	1111 Superior Avenue Street, Room 630	(216) 522-4180 ext. 211
Douglas Sweazy	Columbus, OH 43215-2542	2 Nationwide Plaza, Suite 1400	(614) 469-6860 ext. 276
Charles (Ted) Davis	Detroit, MI 48226	477 Michigan Avenue, Room 515	(313) 226-6075 ext. 245

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John Lonsdale	Milwaukee, WI 53203	310 W. Wisconsin Avenue, Suite 400	(414) 297-1231
Jim Ryan	Springfield, IL 62704	511 W. Capitol Avenue, Suite 302	(217) 492-4416 ext. 109
Billy Medina	Ft. Worth, TX 76155	4300 Amon Carter Blvd, Suite 114	(817) 684-5517 ext. 5517
John Tillotson	Albuquerque, NM 87102	625 Silver Avenue SW, Suite 320	(505) 346-6736
Frederico Manzanares	Harlingen, TX 78550-6855	222 E. Van Buren, Suite 500	(956) 427-8533 ext. 226
Stephen Curry	Houston, TX 77074	8701 South Gessner Drive, Suite 1200	(713) 773-6500 ext. 242
Andy LaMonica	Little Rock, AR 72202	2120 River Front Drive, Suite 250	(501) 324-5871 ext. 239
Armando Garcia	Lubbock, TX 79401-2693	1205 Texas Avenue, Room 408	(806) 472-7462 ext. 244
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F. Steven Parker	Kansas City, MO 64105	323 W. 8th Street, Suite 501	(816) 374-6701 ext. 226
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Tom Harbison	Des Moines, IA 50309-2186	210 Walnut Street, Room 749	(515) 284-4653
VACANT	Cedar Rapids, IA 52401-1806	215 4th Avenue SE, Suite 200	(319) 362-6405 ext. 218
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James Pipper	Phoenix, AZ 85004-1093	2828 N. Central Avenue, Suite 800	(602) 745-7230
Barbara Madel	Glendale, CA 91203-2304	330 North Brand Blvd., Suite 1200	(818) 552-3314
Maria Hughes	San Diego, CA 92101-3500	550 West C Street Suite 550	(619) 557-7250 ext. 1139
Pete Peterson	Las Vegas, NV 89101	400 South Fourth Street, Suite 250	(702) 388-6800
Kimberly Hite	Honolulu, HI 96850-4981	300 Ala Moana Boulevard, Room 2-235	(808) 541-3024
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Kenneth Lujan	Hagatna, GU 96919-2003	400 Route 8, Suite 302	(671) 472-7277
Tom Ewbank	Seattle, WA 98101-1128	1200 6th Ave, Suite 1700	(206) 553-2746
Richard Blum	Spokane, WA 99201	801 West Riverside Avenue, Suite 200	(509) 353-2807
Terrence Moore	Anchorage, AK 99501	510 "L" Street, Suite 310	(907) 271-4854
James Steiner	Portland, OR 97201-5494	1515 SW Fifth Avenue, Suite 1050	(503) 326-2586
Rod Grzadzieski	Boise, ID 83702-5745	1020 Main Street, Suite 290	(208) 334-1696 ext. 233



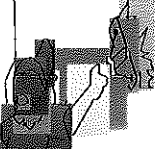
# **HEADQUARTERS POLICY FLASH**

## **POLICY FLASH 2004-18**

DATE: May 28, 2004  
TO: Procurement Directors  
FROM: Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

SUBJECT: **Implementing the Business Process Change for Inter-Entity**

SUMMARY: This Policy Flash distributes a memorandum from the Acting Director, Office of Management, Budget and Evaluation/Acting Chief Financial Officer on required actions to implement new accounting policies and procedures for Interoffice Work Orders and Memorandum Purchase Orders, as well as a draft of Chapter 12 of the DOE Accounting Handbook. These documents are for your information and use in working with your financial officers in implementing the new requirements.



## **POLICY FLASH 2004-18**

For additional guidance on the attached memorandum, please contact your local chief financial officer or Dean Olson, Director, Office of Financial Policy, at 202-486-4860.

A handwritten signature in black ink, appearing to read "Michael Fischetti", with a stylized flourish at the end.

Michael Fischetti, Acting Director  
Office of Procurement  
and Assistance Policy



# **HEADQUARTERS POLICY FLASH**

## **POLICY FLASH 2004-19**

**DATE:** June 17, 2004  
**TO:** Procurement Directors  
**FROM:** Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

**SUBJECT:** **Central Contractor Registration (CCR) and Awards**

**SUMMARY:** This Policy Flash provides information on incorporating the requirements for CCR registration into solicitations and contracts.

## **POLICY FLASH 2004-19**

### **Background**

Policy Flashes 2003-05, 2003-12, and 2003-27 provided information on the new requirement for contractors to register in the CCR (with limited exceptions). This requirement became effective on October 1, 2003. The CCR eliminates the need to maintain paper-based sources of contract information and provides contracting officers and financial office personnel access to contractor data and industry information via the internet. This Flash provides guidance on including CCR requirements in solicitations and contracts. The contracting officer shall not award a contract to an offeror not registered in the CCR unless the acquisition is exempt under FAR 4.1102.

### **Requirement**

CCR requirements are found in FAR Part 4, with a corresponding clause at FAR 52.204-7, which must be included in solicitations and contracts. The clause provides that by submission of an offer, the offeror acknowledges the requirement to be registered in the CCR prior to award and to remain so during any resulting contract through final payment. Subparagraph (d) of FAR 52.204-7 requires contracting officers to proceed to the next otherwise successful registered offeror if an unregistered offeror does not become registered in the CCR in the time prescribed by the contracting officer.

Absent guidance from contracting officers, some offerors could inadvertently fail to meet this registration requirement, which could cause significant delays, inconveniences, and/or loss of award.

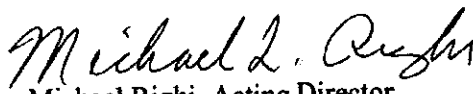
### **Changes to Work Processes**

1) Contracting officers should inform all prospective offerors of the requirements of FAR 52.204-7, "Central Contractor Registration," by:

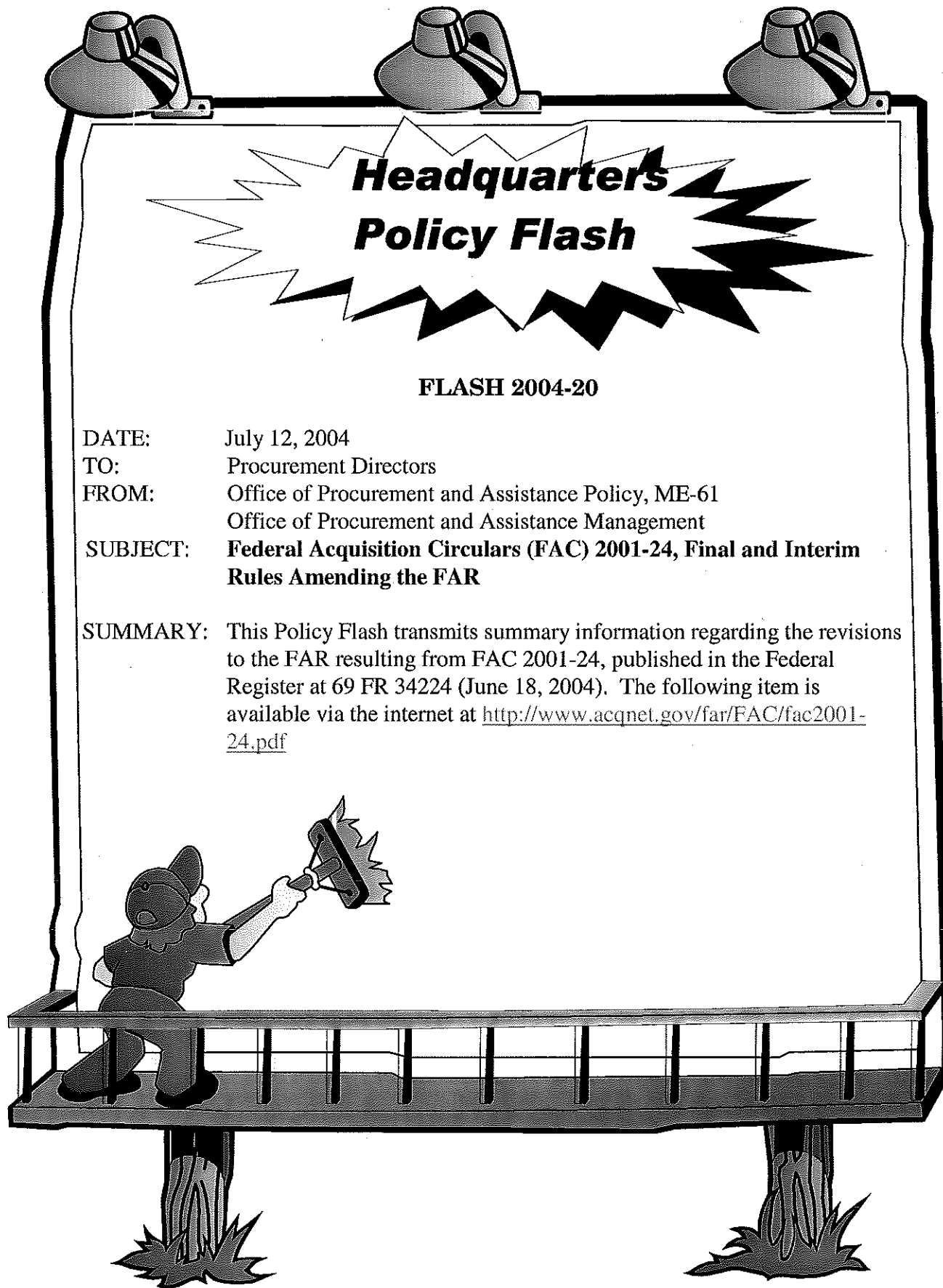
- ✓ including a CCR registration requirement notice to offerors in solicitation cover letters;
- ✓ considering, where appropriate, requiring a written acknowledgement from the offeror of its registration in the CCR; and
- ✓ including the full text of FAR 52.204-7 in Section I of the solicitation.

2) Prior to award, unless the acquisition is exempt under FAR 4.1102, the contracting officer must check the CCR database at [www.ccr.gov](http://www.ccr.gov) to verify the selected offeror is in the database and document the file with the date of the review. If the offeror is not registered, the contracting officer shall follow the guidance at FAR 4.1103(c).

Please contact Jackie Kniskern at (202) 586-8189 or [jacqueline.kniskern@hq.doe.gov](mailto:jacqueline.kniskern@hq.doe.gov) with any questions.

  
Michael Righi, Acting Director  
Office of Procurement and Assistance Policy

cc: PPAG Members



## **Headquarters Policy Flash**

**FLASH 2004-20**

**DATE:** July 12, 2004  
**TO:** Procurement Directors  
**FROM:** Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management  
**SUBJECT:** **Federal Acquisition Circulars (FAC) 2001-24, Final and Interim Rules Amending the FAR**

**SUMMARY:** This Policy Flash transmits summary information regarding the revisions to the FAR resulting from FAC 2001-24, published in the Federal Register at 69 FR 34224 (June 18, 2004). The following item is available via the internet at <http://www.acqnet.gov/far/FAC/fac2001-24.pdf>



## **FLASH 2004-20**

**July 12, 2004**

### **Federal Acquisition Circular (FAC) 2001-24**

#### **1. Incentives for Use of Performance-Based Contracting for Services (Interim) (FAR Case 2004-004)**

*Effective Date: June 18, 2004*

##### **What is the purpose of this FAR Case?**

This interim rule amends the FAR providing authority to treat performance-based contract or task orders for services as commercial items if specific conditions are met. It also requires agencies to report on performance-based contracts or task orders awarded using this authority. This rulemaking affects FAR Parts 2, Definitions, 12, Acquisition of Commercial Items, 37, Service Contracting, and 52, Solicitation Provisions and Contract Clauses.

##### **How will this affect work processes?**

- ✓ Provides that performance-based contracts and task orders for services with an estimated value not to exceed \$25,000,000, be treated as commercial items.
- ✓ Consider contracts or task orders as a commercial item if –
  - The work is defined in measurable, mission related terms;
  - It identifies the specific end products or outputs to be achieved; and
  - Contains firm fixed prices for specific tasks to be performed or outcomes to be achieved.
- ✓ Evaluate whether the source of the services provides similar services to the general public under terms and conditions similar to those offered to the Federal Government.
- ✓ Ensure that the data collected, entered, and maintained in FPDS-NG is reliable and sufficient to identify the contracts or task orders treated as or considered commercial items

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**July 12, 2004**

**2. Definitions Clause (FAR Case 2002-013)**

*Effective Date: July 19, 2004*

**What is the purpose of this FAR Case?**

The final rule clarifies the applicability of FAR definitions to solicitation provisions and contract clauses. This rule amends FAR by deleting the list of definitions from the clause at FAR 52.202-1, Definitions, and replaces the list with general policy as to the appropriate FAR definition related to solicitation provisions and contract clauses.

**How will this affect work processes?**

- ✓ As of the effective date of this rule, all solicitations and contracts shall include the revised clause at 52.202-1.
- ✓ Inform proposed offers and contractors that when a word or term is defined in the FAR, the word or term has the same meaning as the definition in FAR 2.101.

**3. Procurement Lists (FAR Case 2003-013)**

*Effective Date: July 19, 2004*

**What is the purpose of this FAR Case?**

This final rule clarifies that the Javits-Wagner-O'Day (JWOD) program is a mandatory source when supplies or services have been added to the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled. In addition, this FAR case seeks to avoid misuse of mandatory source authority by correcting confusion.

**How will this affect work processes?**

- ✓ Creates web access to the "Procurement List" in order to determine if a supply or service should be obtained from a mandatory source.
- ✓ Provides an updated address for communication with the Committee for the Purchase From People Who Are blind or Severely Disabled on any related matter.

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**July 12, 2004**

### **4. Determining Official for Employment Provision Compliance-Immigration and Nationality Act (INA) (FAR Case 2004-009)**

*Effective Date: June 18, 2004*

#### **What is the purpose of this FAR Case?–**

This final rule amends FAR Part 9, Contractor Qualifications, to assign responsibility to the Attorney General of the United States and the Secretary of Homeland Security for determining when a contractor is not in compliance with the Immigration and Nationality Act (INA).

#### **How will this affect work processes?**

- ✓ Debaring Officials may now debar a contractor based on a determination by the Secretary of Homeland Security or the Attorney General of the United States if that contractor is not in compliance with the Immigration and Nationality Act.

### **5. Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs) (FAR Case 1999-603)**

*Effective Date: July 19, 2004*

#### **What is the purpose of this FAR Case?**

This final rule amends the FAR to incorporate policies and procedures for services under Federal Supply Schedules by making several changes to FAR Part 8, Required Sources of Supplies and Services. There are a number of updates relevant to the use of Federal Supply Schedules, below is a limited list of essential revisions that are applicable to our daily processes. The Federal Acquisition Circular 2001-24 should be reviewed in its entirety for additional changes.

#### **How will this affect work processes?**

- ✓ When ordering against a Federal Supply Schedule (FSS) for another agency, contracting officers are responsible for applying regulatory and statutory requirements on behalf of that agency. Likewise, the requiring activity is obligated to provide the applicable regulatory and statutory requirements to the ordering CO.

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- ✓ Contracting officer's are advised to seek price reductions for any size order and at any time during the FSS order process especially when lower pricing for the same or comparable item can be found elsewhere or when a BPA is established for a recurring requirement.
- ✓ Contracting officers are directed not to seek competition outside of the FSS. However, competition within FSSs is still required.

### **6. Designated Countries-New European Communities Member States (FAR Case 2004-008)**

*Effective Date: June 18, 2004*

#### **What is the purpose of this FAR Case?**

This final rule amends the FAR to implement a determination made by the U.S. Trade Representative that suppliers from 10 new member countries of the European Communities (EC) are eligible to participate in U.S. government procurement under the terms and conditions of the World Trade Organization Government Procurement Agreement (WTO GPA) and in accordance with the Trade Agreements Act.

#### **How will this affect work processes?**

- ✓ Contracting officers are advised that the new member countries are added to the list of designated countries at FAR Part 22, Application of Labor Laws to Government Acquisition and Part 25, Foreign Acquisition.
- ✓ Contracting officers can now accept offers, subject to WTO GPA, for eligible products from Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia without application of the Buy American Act evaluation factor. However, in accordance with the Energy and Water Act of 2004 to the greatest extent practicable all equipment and products purchased with appropriated funds should be American Made.

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**7. Buy American Act-Nonavailable Articles (FAR Case 2003-007)**

*Effective Date: July 19, 2004*

**What is the purpose of this FAR Case?**

This final rule amends the FAR to add food and textile items to the list of articles not available from domestic sources in sufficient quantities and satisfactory quality.

**How will this affect work processes?**

- ✓ Contracting Officers are advised that the Buy American Act does not apply to the specified products unless he/she determines before the receipt of bids or final offer in negotiation that an article on the list is available domestically available in sufficient and reasonably available quantities and of a satisfactory quality.

**8. Application of Cost Principles and Procedures and Accounting for Unallowable Costs (FAR Case 2002-006)**

*Effective Date: July 19, 2004*

**What is the purpose of this FAR Case?**

This final rule amends the FAR to revise the application of principles and procedures in order to clarify and restructure.

**How will this affect work processes?**

- ✓ Contracting officers are advised that this revision does not affect policy and procedure; therefore, work processes will remain unchanged.

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**July 12, 2004**

**9. Gains and Losses, Maintenance and Repair Costs, and Material Costs (FAR Case 2002-008)**

*Effective Date: July 19, 2004*

**What is the purpose of this FAR Case?**

This final rule amends the FAR to delete the cost principle for maintenance and repair costs and revise the cost principles for contingencies, material costs, and training and education costs.

**How will this affect work processes?**

- ✓ Contracting officers are advised that this revision does not affect policy and procedure; therefore, work processes will remain unchanged.

**10. Technical Amendments**

The amendment makes editorial changes to FAR 8.003(d), 11.102, 11.202(b), and removes sections 53.301-254 and 53.301-255.

Written comments to the interim rulemaking are due in this office on or before August 6, 2004. This will allow time to prepare a consolidated response to the General Services Administration, as necessary.

Questions concerning this Flash should be directed to Denise P. Wright on (202) 586-6217 or via e-mail at [Denise.Wright@hq.doe.gov](mailto:Denise.Wright@hq.doe.gov)



Michael P. Fischetti, Acting Director  
Office of Procurement and  
Assistance Policy

cc:  
PPAG Members



# Federal Register

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Friday,  
June 18, 2004

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## Part II

**Department of  
Defense**

**General Services  
Administration**

**National Aeronautics  
and Space  
Administration**

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48 CFR Chapter 1  
Federal Acquisition Regulations; Final  
Rules

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Chapter 1****Federal Acquisition Circular 2001-24;  
Introduction**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Summary presentation of final and interim rules.

**SUMMARY:** This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2001-24. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.acqnet.gov/far>.

**DATES:** For effective dates and comment dates, see separate documents which follow.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, at (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact the analyst whose name appears in the table below in relation to each FAR case or subject area. Please cite FAC 2001-24 and specific FAR case number(s). Interested parties may also visit our Web site at <http://www.acqnet.gov/far>.

Item	Subject	FAR case	Analyst
I .....	Incentives for Use of Performance-Based Contracting for Services (Interim)	2004-004	Wise.
II .....	Definitions Clause .....	2002-013	Parnell.
III .....	Procurement Lists .....	2003-013	Nelson.
IV .....	Determining Official for Employment Provision Compliance—Immigration and Nationality Act (INA).	2004-009	Goral.
V .....	Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs).	1999-603	Nelson.
VI .....	Designated Countries—New European Communities Member States .....	2004-008	Davis.
VII .....	Buy American Act—Nonavailable Articles .....	2003-007	Davis.
VIII .....	Application of Cost Principles and Procedures and Accounting for Unallowable Costs.	2002-006	Loeb.
IX .....	Gains and Losses, Maintenance and Repair Costs, and Material Costs .....	2002-008	Loeb.
X .....	Technical Amendments.		

**SUPPLEMENTARY INFORMATION:**

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2001-24 amends the FAR as specified below:

**Item I—Incentives for Use of  
Performance-Based Contracting for  
Services (Interim) (FAR Case 2004-004)**

This interim rule amends the FAR to implement Sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136). Section 1431 enacts Governmentwide authority to treat performance-based contracts or task orders for services as commercial items if certain conditions are met, and requires agencies to report on performance-based contracts or task orders awarded using this authority. Section 1433 amends the definition of commercial item to add specific performance-based terminology and to conform to the language added by Section 1431. Contracting officers will be able to use FAR Part 12, Acquisition of Commercial Items, and Subpart 37.6, Performance-Based Contracting, for non-commercial services and treat these services as commercial services when specific conditions are met. Agencies

will be required to report on performance-based contracts or task orders awarded using this authority.

**Item II—Definitions Clause (FAR Case 2002-013)**

This final rule revises FAR 2.201 and the clause at 52.202-1 to clarify the applicability of FAR definitions to solicitation provisions and contract clauses. The list of definitions in 52.202-1 is removed and replaced with policy stating that when a solicitation provision or contract clause uses a word or term that is defined in the FAR, the word or term has the meaning given in FAR 2.101 at the time the solicitation was issued. Certain exceptions to this policy are listed in FAR 52.202-1.

**Item III—Procurement Lists (FAR Case 2003-013)**

This final rule amends the FAR to clarify that the Javits-Wagner O'Day (JWOD) program becomes a mandatory source of supplies and services when the supplies or services have been added to the Procurement List maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled.

**Item IV—Determining Official for  
Employment Provision Compliance—  
Immigration and Nationality Act (INA)  
(FAR Case 2004-009)**

This final rule amends FAR 9.406-2(b)(2) by revising the responsibility for determining when a contractor is not in compliance with the Immigration and Nationality Act (INA) to include both the Attorney General of the United States and the Secretary of Homeland Security.

This rule implements Executive Order 13286 published March 5, 2003, which amended Section 4 of Executive Order 12989 published February 15, 1996.

Debarring officials may now debar a contractor based on a determination by the Secretary of Homeland Security or the Attorney General of the United States.

**Item V—Federal Supply Schedules  
Services and Blanket Purchase  
Agreements (BPAs) (FAR Case 1999-  
603)**

This final rule amends the FAR in order to incorporate policies and procedures for services under Federal Supply Schedules. The rule—

- Adds a definitions section;
- Adds information regarding the Department of Veterans Affairs delegated authority to establish medical supply schedules;



- Adds language to clarify the differences between an Authorized Federal Supply Schedules (FSS) Pricelist and a FSS publication;
- Adds additional information regarding e-buy, GSA's electronic quote system for the schedules program;
- Clarifies that competition shall not be sought outside the Federal Supply Schedules;
- Adds language to make it clear that the contracting officer placing an order on another agency's behalf is responsible for applying that agency's regulatory and statutory requirements; and that the requiring activity is required to provide information on the applicable regulatory and statutory requirements to the contracting officer;
- Adds new coverage on use of statements of work when acquiring services from the schedules;
- Requires that when an agency awards a task order requiring a statement of work, that if the award is based on other than price (best value), the contracting officer shall provide a brief explanation of the basis for the award decision to any unsuccessful contractor that requests such information.
- Adds language stating that the performance period of Blanket Purchase Agreement (BPA) established under the schedules program may cross option periods on the base contracts;
- Refines guidance regarding the use of Governmentwide BPAs;
- Adds language to require the ordering activity to document the results of its BPA review;
- Adds language that encourages or reminds agencies that they can seek a price reduction at any time, not just when an order exceeds the maximum order threshold;
- Adds additional language to allow for consideration of socio-economic status when identifying the potential competitors for an order;
- Reinforces documentation requirements generally and adds new guidance addressing the documentation of orders for services and sole source orders;
- Adds new coverage to allow agencies to make payment for oral or written orders by any authorized means, including the Governmentwide commercial purchase card;
- Reserves the ordering procedures for Mandatory Use Schedules section;
- Clarifies the procedures for termination for cause and convenience; and
- Reorganizes and revises the subpart text for ease of use.

#### **Item VI—Designated Countries—New European Communities Member States (FAR Case 2004-008)**

This final rule amends the FAR to implement a determination by the United States Trade Representative (USTR) under the Trade Agreements Act that suppliers from the 10 new member states of the European Communities (EC) (*i.e.*, the European Union) are eligible to participate in U.S. Government procurement under the terms and conditions of the World Trade Organization Government Procurement Agreement (WTO GPA). This means that in acquisitions subject to the WTO GPA, the contracting officer can accept offers of eligible products from Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia without application of the Buy American Act evaluation factor.

#### **Item VII—Buy American Act—Nonavailable Articles (FAR Case 2003-007)**

This final rule amends FAR 25.104(a) to add certain food and textile items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality. This case is based on extensive market research by the Defense Logistics Agency. Unless the contracting officer learns before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available quantities of a satisfactory quality, the Buy American Act does not apply to acquisition of these items as end products, and the contracting officer may treat foreign components of the same class or kind as domestic components.

#### **Item VIII—Application of Cost Principles and Procedures and Accounting for Unallowable Costs (FAR Case 2002-006)**

This final rule amends the FAR by revising FAR 31.204, Application of principles and procedures, to improve clarity and structure. The case was initiated as a result of comments and recommendations received from industry and Government representatives during a series of public meetings. This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, *e.g.*, price revision of fixed-

price incentive contracts, terminated contracts, or indirect cost rates.

#### **Item IX—Gains and Losses, Maintenance and Repair Costs, and Material Costs (FAR Case 2002-008)**

This final rule amends the FAR by deleting the cost principle at FAR 31.205-24, Maintenance and repair costs, because either Cost Accounting Standards (CAS) or Generally Accepted Accounting Practices (GAAP) adequately address these costs. The rule also revises the cost principles at FAR 31.205-7, Contingencies; FAR 31.205-26, Material costs; and FAR 31.205-44, Training and education costs, by improving clarity and structure, and removing unnecessary and duplicative language.

The case was initiated as a result of comments and recommendations received from industry and Government representatives during a series of public meetings. This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, *e.g.*, price revision of fixed-price incentive contracts, terminated contracts, or indirect cost rates.

#### **Item X—Technical Amendments**

This amendment makes editorial changes at 8.003(d), 11.102, and 11.202(b), and removes sections 53.301-254 and 53.301-255.

Dated: June 10, 2004.

**Ralph J. De Stefano,**  
*Acting Director, Acquisition Policy Division.*

#### **Federal Acquisition Circular**

##### **Number 2001-224**

Federal Acquisition Circular (FAC) 2001-24 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001-24 are effective July 19, 2004, except for Items I, IV, VI, and X, which are effective June 18, 2004.

Dated: June 9, 2004.

**Deidre A. Lee,**  
*Director, Defense Procurement and Acquisition Policy.*

Dated: June 10, 2004.

**David A. Drabkin,**  
*Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.*

Dated: June 8, 2004.

**Tom Luedtke,**

Assistant Administrator for Procurement,  
National Aeronautics and Space  
Administration.

[FR Doc. 04-13617 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 2, 4, 12, 37, and 52

[FAC 2001-24; FAR Case 2004-004;  
Item I]

RIN 9000-AJ97

#### Federal Acquisition Regulation; Incentives for Use of Performance- Based Contracting for Services

**AGENCIES:** Department of Defense (DoD),  
General Services Administration (GSA),  
and National Aeronautics and Space  
Administration (NASA).

**ACTION:** Interim rule with request for  
comments.

**SUMMARY:** The Civilian Agency  
Acquisition Council and the Defense  
Acquisition Regulations Council  
(Councils) have agreed on an interim  
rule amending the Federal Acquisition  
Regulation (FAR) to implement sections  
1431 and 1433 of the National Defense  
Authorization Act for Fiscal Year 2004  
(Pub. L. 108-136). Section 1431 enacts  
Governmentwide authority to treat  
performance-based contracts or task  
orders for services as commercial items  
if certain conditions are met, and  
requires agencies to report on  
performance-based contracts or task  
orders awarded using this authority.  
Section 1433 amends the definition of  
commercial item to add specific  
performance-based terminology and to  
conform to the language added by  
section 1431.

**DATES:** *Effective Date:* June 18, 2004.

*Comment Date:* Interested parties  
should submit comments to the FAR  
Secretariat at the address shown below  
on or before August 17, 2004, to be  
considered in the formulation of a final  
rule.

**ADDRESSES:** Submit printed comments  
to General Services Administration,  
FAR Secretariat (MVA), 1800 F Street,  
NW., Room 4035, ATTN: Laurie Duarte,  
Washington, DC 20405. Submit  
electronic comments via the Internet to  
the U.S. Government's Web site at <http://www.regulations.gov>, or to GSA's e-  
mailbox at [farcase.2004-004@gsa.gov](mailto:farcase.2004-004@gsa.gov).

Please submit comments only and cite  
FAC 2001-24, FAR case 2004-004, in  
all correspondence related to this case.

**FOR FURTHER INFORMATION CONTACT:** The  
FAR Secretariat at (202) 501-4755, for  
information pertaining to status or  
publication schedules. For clarification  
of content, contact Ms. Julia Wise,  
Procurement Analyst, at (202) 208-  
1168. Please cite FAC 2001-24, FAR  
case 2004-004.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Section 1431 of the National Defense  
Authorization Act for Fiscal Year 2004  
(Pub. L. 108-136) enacts  
Governmentwide authority to treat  
certain performance-based contracts or  
task orders for services as commercial  
items if the—

(1) Value of the contract or task order  
is estimated not to exceed \$25,000,000;

(2) Contract or task order sets forth  
specifically each task to be performed  
and, for each task—

a. Defines the task in measurable,  
mission-related terms;

b. Identifies the specific end products  
or output to be achieved; and

c. Contains firm, fixed prices for  
specific tasks to be performed or  
outcomes to be achieved; and

(3) Source of the services provides  
similar services to the general public  
under terms and conditions similar to  
those offered to the Federal  
Government.

Implementation of section 1431 also  
requires agencies to collect and  
maintain reliable data sufficient to  
identify the contracts or task orders  
treated as contracts for commercial  
items using the authority of this section.  
The data will be collected using the  
Federal Procurement Data System-Next  
Generation (FPDS-NG). By November  
24, 2006, OMB will be required to report  
to the Committees on Governmental  
Affairs and on Armed Services of the  
Senate and the Committees on  
Government Reform and on Armed  
Services of the House of Representatives  
on the implementation of Section 1431.  
The report shall include data on the use  
of such authority both Governmentwide  
and for each department and agency.  
The authority of section 1431 expires on  
November 24, 2013, ten years after  
enactment. Section 1433 also amends  
the definition of commercial services to  
conform to the language added by  
section 1431 by inserting performance-  
based terms for clarification. The  
implementation of sections 1431 and  
1433 will—

• Revise the commercial items  
definition in FAR 2.101 and 52.202-1;

• Add a new record requirement for  
reporting commercial performance-  
based contracts or task orders to FAR  
4.601;

• Incorporate the conditions for using  
FAR Part 12 for any performance-based  
contract or task order for services in  
FAR 12.102; and

• Add performance-based terms as  
required by section 1433, and

• Add a cross reference to FAR  
12.102(g) in FAR 37.601.

The reference to the definition of  
performance-based contracting in the  
proposed language is a change from the  
statutory requirement. Section 1431  
provides for a contract or task order to  
be treated as a contract for commercial  
items if: "The contract or task order sets  
forth specifically each task to be  
performed and for each task—defines  
the task in measurable, mission-related  
terms; identifies the specific end  
products or output to be achieved; and  
contains firm, fixed prices for specific  
tasks to be performed or outcomes to be  
achieved." However, the two  
requirements of law regarding how  
tasks, products, or outputs are described  
are being implemented by requiring  
contracts or task orders to meet the  
definition of performance-based  
contracting at FAR 2.101. This language  
and that at 12.102 paragraphs (g)(1)(iv)  
and (v) and in (g)(2) are to ensure  
consistency with the overarching policy  
in FAR 37.601 that applies to  
performance-based contracting for  
services.

Section 1431 recommends that the  
Federal Procurement Data System  
(FPDS) or other reporting mechanism  
collect this data. The FPDS is the only  
Governmentwide system that can  
potentially collect this data. This system  
currently tracks performance-based  
contracts and task orders awarded. A  
petition was made to the FPDS-NG  
Change Control Board to incorporate a  
change to report data on services treated  
as commercial items under the  
conditions stated in section 1431 when  
using performance-based contracting  
techniques.

This is not a significant regulatory  
action and, therefore, was not subject to  
review under Section 6(b) of Executive  
Order 12866, Regulatory Planning and  
Review, dated September 30, 1993. This  
rule is not a major rule under 5 U.S.C.  
804.

##### B. Regulatory Flexibility Act

The changes may have a significant  
economic impact on a substantial  
number of small entities within the  
meaning of the Regulatory Flexibility  
Act, 5 U.S.C. 601 *et seq.*, because we  
have changed procedures for award and

administration of contracts or task orders enabling the Government to treat certain services as commercial items when the contract or task order—

- Is entered into on or before November 24, 2013;
- Has a value of \$25 million or less;
- Meets the definition of performance-based contracting at FAR 2.101;
- Includes a quality assurance surveillance plan;
- Includes performance incentives where appropriate;
- Specifies a firm-fixed price for specific tasks to be performed or outcomes to be achieved; and
- Is awarded to an entity that provides similar services to the general public under terms and conditions similar to those in the contract or task order.

Therefore, we have prepared an Initial Regulatory Flexibility Analysis that is summarized as follows:

The rule (1) amends the commercial items definition in FAR 2.101 and 52.202-1; (2) adds a new record requirement for reporting commercial performance-based contracts or task orders to FAR 4.601; (3) incorporates the conditions for using FAR Part 12 for any performance-based contract or task order for services in FAR 12.102; and (4) adds performance-based terms as required by section 1433, and (5) adds a cross reference to FAR 12.102(g) in FAR 37.601. The rule will apply to all large and small entities that seek award of performance-based service contracts that are not commercial services as defined by FAR 2.101 and 52.202-1. Although these changes were made to implement section 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (P.L. 108-136), the impact of these changes are positive and may provide (1) new contracting opportunities to small businesses that otherwise would not have been available if their services did not meet the definition of commercial item in FAR 2.101 and 52.202-1; and (2) contracting flexibility for the acquisition community when using PBC techniques.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 4, 12, 37, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001-24, FAR case 2004-004), in correspondence.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) which became effective November 24, 2003. However, pursuant to Public Law 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

#### List of Subjects in 48 CFR Parts 2, 4, 12, 37, and 52

Government procurement.

Dated: June 10, 2004.

Ralph J. De Stefano,  
*Acting Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 12, 37, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 12, 37, and 52 is revised to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

#### PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b) in the definition "Commercial item" by revising the introductory text of paragraph (6) to read as follows:

##### 2.101 Definitions.

\* \* \* \* \*

(b) \* \* \*

*Commercial item means—*

\* \* \* \* \*

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved. For purposes of these services—

\* \* \* \* \*

#### PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.601 by adding paragraph (d)(6) to read as follows:

##### 4.601 Record requirements.

\* \* \* \* \*

(d) \* \* \*

(6) Contracts or task orders treated as commercial items pursuant to 12.102(g).

\* \* \* \* \*

#### PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 4. Amend section 12.102 by adding paragraph (g) to read as follows:

##### 12.102 Applicability.

\* \* \* \* \*

(g)(1) In accordance with section 14313 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) (41 U.S.C. 437), the contracting officer also may use Part 12 for any acquisition performance-based contracting for services that does not meet the definition of commercial item in FAR 2.101, if the contract or task order—

- (i) Is entered into on or before November 24, 2013;
- (ii) Has a value of \$25 million or less;
- (iii) Meets the definition of performance-based contracting at FAR 2.101;
- (iv) Includes a quality assurance surveillance plan;
- (v) Includes performance incentives where appropriate;
- (vi) Specifies a firm-fixed price for specific tasks to be performed or outcomes to be achieved; and
- (vii) Is awarded to an entity that provides similar services to the general public under terms and conditions similar to those in the contract or task order.

(2) In exercising the authority specified in paragraph (g)(1) of this section, the contracting officer should tailor paragraph (a) of the clause at FAR 52.212-4 as may be necessary to ensure the contract's remedies adequately protect the Government's interests.

#### PART 37—SERVICE CONTRACTING

■ 5. Revise section 37.601 to read as follows:

##### 37.601 General.

(a) Performance-based contracting methods are intended to ensure that required performance quality levels are achieved and that total payment is related to the degree that services performed or outcomes achieved meet contract standards. Performance-based contracts or task orders—

(1) Describe the requirements in terms of results required rather than the methods of performance of the work;

(2) Use measurable performance standards (*i.e.*, in terms of quality, timeliness, quantity, etc.) and quality assurance surveillance plans (see 46.103(a) and 46.401(a));

(3) Specify procedures for reductions of fee or for reductions to the price of a fixed-price contract when services are not performed or do not meet contract requirements (see 46.407); and

(4) Include performance incentives where appropriate.

(b) See 12.102(g) for the use of Part 12 procedures for performance-based contracting.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Amend section 52.202–1 by revising the date of the clause and the introductory text of paragraph (c)(6) of the clause to read as follows:

### 52.202–1 Definitions.

\* \* \* \* \*

Definitions (Jun 2004)

\* \* \* \* \*

(c) \* \* \*

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved. For purposes of these services—

\* \* \* \* \*

[FR Doc. 04–13618 Filed 6–17–04; 8:45 am]

BILLING CODE 6820-EP-P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 2 and 52

[FAC 2001–24; FAR Case 2002–013; Item II]

RIN 9000-AJ83

### Federal Acquisition Regulation; Definitions Clause

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify the applicability of FAR definitions to solicitation provisions and contract clauses.

**DATES:** *Effective Date:* July 19, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501–4082. Please cite FAC 2001–24, FAR case 2002–013.

### SUPPLEMENTARY INFORMATION:

#### A. Background

This final rule amends the FAR to delete the list of definitions from the clause at FAR 52.202–1 and to replace the list with general policy regarding the applicability of FAR definitions to solicitation provisions and contract clauses.

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 69 FR 2988, January 21, 2004. Three comments were received from one respondent. The first two comments requested clarification as to whether the second and third sentences of FAR 2.201 and Alternate I of the clause at FAR 52.202–1 are being deleted. This text has been deleted, and the proposed and final rules reflect this. The third comment suggested correcting the Web address in FAR 52.202–1. We agree. The Web address has been changed. The proposed rule has been converted to a final rule with this change and other minor editorial changes.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the principle of how definitions apply is already expressed in FAR Part 2. Since this principle is not as clearly expressed

in the FAR Part 52 clauses, the rule repeats the principle in a clause to clarify this issue for offerors and contractors.

### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

### List of Subjects in 48 CFR Parts 2 and 52

Government procurement.

Dated: June 10, 2004.

Ralph J. De Stefano,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2 and 52 is revised to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

## PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Revise section 2.201 to read as follows:

### 2.201 Contract clause.

Insert the clause at 52.202–1, Definitions, in solicitations and contracts that exceed the simplified acquisition threshold.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Revise section 52.202–1 to read as follows:

### 52.202–1 Definitions.

As prescribed in 2.201, insert the following clause:

Definitions (Jul 2004)

(a) When a solicitation provision or contract clause uses a word or term that is defined in the Federal Acquisition Regulation (FAR), the word or term has the same meaning as the definition in FAR 2.101 in effect at the time the solicitation was issued, unless—

(1) The solicitation, or amended solicitation, provides a different definition;

(2) The contracting parties agree to a different definition;

(3) The part, subpart, or section of the FAR where the provision or clause is prescribed provides a different meaning; or

(4) The word or term is defined in FAR Part 31, for use in the cost principles and procedures.

(b) The FAR Index is a guide to words and terms the FAR defines and shows where each

definition is located. The FAR Index is available via the Internet at <http://www.acqnet.gov> at the end of the FAR, after the FAR Appendix.

(End of clause)

#### 52.213-4 [Amended]

■ 4. Amend section 52.213-4 by removing "(May 2004)" from the clause heading and from paragraph (a)(2)(vi) of the clause and adding "(Jul 2004)" in their place.

■ 5. In section 52.244-6, revise the date of the clause; and in paragraph (a) of the clause revise the definition "Commercial item" to read as follows:

#### 52.244-6 Subcontracts for Commercial Items.

\* \* \* \* \*

Subcontracts for Commercial Items (Jul 2004)

(a) \* \* \*

*Commercial item* has the meaning contained in Federal Acquisition Regulation 2.101, Definitions.

\* \* \* \* \*

[FR Doc. 04-13619 Filed 6-17-04; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 8 and 52

[FAC 2001-24; FAR Case 2003-013; Item III]

RIN 9000-AJ82

#### Federal Acquisition Regulation; Procurement Lists

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify the point that the Javits-Wagner-O'Day (JWOD) program becomes a mandatory source when the supplies or services have been added to the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled. The rule also updates the address for the Committee for Purchase From People Who Are Blind or Severely Disabled.

**DATES:** *Effective Date:* July 19, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAC 2001-24, FAR case 2003-013. The TTY Federal Relay Number for further information is 1-800-877-8973.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule amends the FAR to clarify that the Javits-Wagner-O'Day (JWOD) program becomes a mandatory source of supplies and services when the supplies or services have been added to the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee). A Web site for the "Procurement List" is added, and the address for the Committee has also been updated. These changes are necessary to correct confusion and avoid misuse of mandatory source authority.

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 68 FR 69262, December 11, 2003. One source, the International Safety Equipment Association (ISEA), submitted comments on the proposed rule. The Councils concluded that the proposed rule should be converted to a final rule, with only an editorial change at FAR 8.714 to update address information and a clarification at FAR clause 52.208-9. A summary of the comments and the disposition follows:

**Comment:** The respondent recommended that a new provision be added to FAR 8.002 exempting personal protective equipment from requirements of that part.

**Response:** The Councils do not concur. The proposed change is outside the scope of the FAR case. Further, the FAR does not provide for particular product exemptions. Decisions to add a product or service to the Procurement List are made on a case-by-case basis by the Committee for Purchase From People Who Are Blind or Severely Disabled, following the notice-and-comment rulemaking provisions of the Administrative Procedure Act in accordance with 41 U.S.C. 47(a)(2).

**Comment:** The respondent recommended that the JWOD program provide for exceptions similar to those provided at FAR 8.606 for purchases from Federal Prison Industries (FPI).

**Response:** The Councils do not concur. First, the proposed change is outside the scope of the FAR case. Secondly, 41 U.S.C. 47(d) identifies the Committee as the entity responsible for

rules and regulations necessary to carry out the JWOD program. The Committee's statute and regulations do not provide for FPI-like exceptions, but do provide for purchase exceptions appropriate for JWOD, which are implemented in the FAR.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

##### B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule clarifies that the Javits-Wagner-O'Day (JWOD) program becomes a mandatory source of supplies and services when the supplies or services are added to the Procurement List. While we have made changes to clarify when a supply or service becomes a mandatory JWOD source, we have not substantively changed procedures for award and administration of contracts.

##### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### List of Subjects in 48 CFR Parts 8 and 52

Government procurement.

Dated: June 10, 2004.

Ralph J. De Stefano,  
Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 8 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 8 and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

#### PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 2. Amend section 8.002 by revising paragraphs (a)(1)(iv) and (a)(2)(i) to read as follows:

**8.002 Priorities for use of Government supply sources.**

(a) \* \* \*

(1) \* \* \*

(iv) Supplies which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see Subpart 8.7);

\* \* \* \* \*

(2) *Services.* (i) Services which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see Subpart 8.7);

\* \* \* \* \*

**8.004 [Amended]**

■ 3. Amend section 8.004 by removing from the first sentence the words "available from" and adding "on the Procurement List maintained by" in its place.

■ 4. Amend section 8.703 by revising the first paragraph to read as follows:

**8.703 Procurement list.**

The Committee maintains a Procurement List of all supplies and services required to be purchased from JWOD participating nonprofit agencies. The Procurement List may be accessed at: <http://www.jwod.gov/procurementlist>. Questions concerning whether a supply item or service is on the Procurement List may be submitted at Internet e-mail address [info@jwod.gov](mailto:info@jwod.gov) or referred to the Committee offices at the following address and telephone number: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, VA 22202-3259, (703) 603-7740.

\* \* \* \* \*

■ 5. Amend section 8.714 by revising paragraph (b) to read as follows:

**8.714 Communications with the central nonprofit agencies and the Committee.**

\* \* \* \* \*

(b) Any matter requiring referral to the Committee shall be addressed to the Executive Director of the Committee, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, VA 22202-3259.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 6. Amend section 52.208-9 by revising the date of the clause, by redesignating paragraph (c) as paragraph (a) and revising the first sentence of paragraph (a) to read as follows:

**52.208-9 Contractor Use of Mandatory Sources of Supply or Services.**

\* \* \* \* \*

**Contractor Use of Mandatory Sources of Supply or Services (Jul 2004)**

(a) Certain supplies or services to be provided under this contract for use by the Government are required by law to be obtained from nonprofit agencies participating in the program operated by the Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee) under the Javits-Wagner-O'Day Act (JWOD) (41 U.S.C. 48). \* \* \*

\* \* \* \* \*

[FR Doc. 04-13620 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

**DEPARTMENT OF DEFENSE****GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Part 9**

[FAC 2001-24; FAR Case 2004-009; Item IV]

RIN 9000-AJ98

**Federal Acquisition Regulation; Determining Official for Employment Provision Compliance—Immigration and Nationality Act (INA)**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) by revising the responsibility for determining when a contractor is not in compliance with the Immigration and Nationality Act (INA) to include both the Attorney General and the Secretary of Homeland Security, pursuant to Executive Order 13286 published March 5, 2003.

**DATES:** *Effective Date:* June 18, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Craig Goral, Procurement Analyst, at (202) 501-3856. Please cite FAC 2001-24, FAR case 2004-009.

**SUPPLEMENTARY INFORMATION:****A. Background**

This final rule amends FAR 9.406-2(b)(2) by revising the responsibility for determining when a contractor is not in compliance with INA to include both the Attorney General and the Secretary of Homeland Security pursuant to Executive Order (E.O.) 13286 published March 5, 2003. E.O. 13286 amended Section 4 of E.O. 12989, published February 15, 1996, by adding, along with the Attorney General, the Secretary of Homeland Security as the responsible authority for determining when a contractor is not in compliance with the INA. Pursuant to this amendment, it is necessary to revise FAR 9.406-2(b)(2) to reflect this change.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**B. Regulatory Flexibility Act**

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Part 9 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2001-24, FAR case 2004-009), in correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**List of Subjects in 48 CFR Part 9**

Government procurement.

Dated: June 10, 2004.

**Ralph J. De Stefano,**  
*Acting Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 9 as set forth below:

**PART 9—CONTRACTOR QUALIFICATIONS**

■ 1. The authority citation for 48 CFR part 9 is revised to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 9.406-2 by revising paragraph (b)(2) to read as follows:

**9.406-2 Causes for debarment.**

\* \* \* \* \*

(b) \* \* \*

(2) A contractor, based on a determination by the Secretary of Homeland Security or the Attorney General of the United States, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order 12989, as amended by Executive Order 13286). Such determination is not reviewable in the debarment proceedings.

\* \* \* \* \*

■ 3. Amend section 9.406-4 by revising the third sentence of paragraph (b) to read as follows:

**9.406-4 Period of debarment.**

\* \* \* \* \*

(b) \* \* \* Debarments under 9.406-2(b)(2) may be extended for additional periods of one year if the Secretary of Homeland Security or the Attorney General determines that the contractor continues to be in violation of the employment provisions of the Immigration and Nationality Act. \* \* \*

\* \* \* \* \*

[FR Doc. 04-13621 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 8, 38, and 53**

[FAC 2001-24; FAR Case 1999-603; Item V]

RIN 9000-AJ63

**Federal Acquisition Regulation;  
Federal Supply Schedules Services  
and Blanket Purchase Agreements  
(BPAs)**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to incorporate policies for services and to strengthen the procedures for establishing Blanket Purchase Agreements under the Federal Supply Schedules.

**DATES:** *Effective Date:* July 19, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501-1900. Please cite FAC 2001-24, FAR case 1999-603. The TTY Federal Relay Number for further information is 1-800-877-8973.

**SUPPLEMENTARY INFORMATION:****A. Background**

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 68 FR 19294, April 18, 2003, with request for comments. Thirty-four respondents submitted public comments. A discussion of the comments is provided below. The differences between the proposed rule and final rule are addressed in the Councils' response to comments 1 through 9. General changes made to FAR Subpart 8.4 by this rulemaking are provided in the list below. Of particular note, the rule—

- Adds language to make it clear that the contracting officer placing an order on another agency's behalf is responsible for applying that agency's regulatory and statutory requirements; and that the requiring activity is required to provide information on the applicable regulatory and statutory requirements to the contracting officer;
- Adds new coverage on use of statements of work when acquiring services from the schedules;
- Requires that when an agency awards a task order requiring a statement of work, that if the award is based on other than price (best value), the contracting officer shall provide a brief explanation of the basis for the award decision to any unsuccessful contractor that requests such information;

- Refines guidance regarding the use of Governmentwide BPAs;
- Adds language to require the ordering activity to document the results of its BPA review; and
- Reinforces documentation requirements generally and adds new guidance addressing the documentation of orders for services and sole source orders.

In addition, the rule also—

- Adds a definitions section;
- Adds information regarding the Department of Veterans Affairs delegated authority to establish medical supply schedules;
- Adds language to clarify the differences between an Authorized Federal Supply Schedules (FSS) Pricelist and a FSS publication;

- Adds additional information regarding e-Buy, GSA's electronic quote system for the schedules program;

- Clarifies that competition shall not be sought outside the Federal Supply Schedules;

- Adds language stating that the performance period of Blanket Purchase Agreements (BPA) established under the schedules program may cross option periods on the base contracts;

- Adds language that encourages or reminds agencies that they can seek a price reduction at any time, not just when an order exceeds the maximum order threshold;

- Adds additional language to allow for consideration of socio-economic status when identifying the potential competitors for an order;

- Adds new coverage to allow agencies to make payment for oral or written orders by any authorized means, including the Governmentwide commercial purchase card;

- Reserves the ordering procedures for Mandatory Use Schedules section;

- Clarifies the procedures for termination for cause and convenience; and

- Reorganizes and revises the subpart text for ease of use.

**B. Summary and Discussion of  
Significant Public Comments**

1. *Comment: Ordering offices need not seek further competition.* Several respondents stated that the phrase "Ordering offices shall not seek further competition" is confusing or misleading. In addition, the requirement that agencies need not seek further competition, synopses the requirement, or consider small business programs when placing orders or issuing Blanket Purchase Agreements under the schedule ordering procedures did not seem fair.

*Councils' response:* Partially concur. The Councils determined that although the language was clear, an additional explanation would be added. The Councils clarified the language at 8.404(a) to indicate that ordering activities need not seek competition outside of the Federal Supply Schedules. Agencies must follow the procedures of Subpart 8.4 to ensure compliance with the requirement for full and open competition as implemented under the Multiple Award Schedules program.

2. *Comment: Use of the term "appropriate number."* Concern was raised regarding the use of the term "appropriate number" at FAR 8.404-1(d)(1) and FAR 8.404-2(c)(2)(ii) of the proposed rule. The term "appropriate number" pertains to the number of



contractors to be considered or contacted as part of the order evaluation and placement process. In general, the respondents were concerned that the language was too vague and did not provide sufficient guidance as to the number of contractors that should be considered or contacted. Further, there was a recommendation that "an appropriate number" be changed to state a specific number or delete the requirement.

*Councils' response:* The Councils partially concur. The rule identifies factors that ordering activities might consider in determining the appropriate number of additional schedule contractors to consider. The intent is to leave it to the discretion of the contracting officer to determine the number of additional contractors to be considered or contacted. The recommendation that a specific number of contractors be identified in place of an "appropriate number" would unnecessarily limit the discretion of the contracting officer. A final note, proposed rule FAR 8.404-1(d)(1) is renumbered in the final rule as FAR 8.405-1(d)(1). Proposed rule FAR 8.404-2(c)(2)(ii) is renumbered FAR 8.405-2(c)(3)(i) in the final rule.

3. *Comment: Price reductions.* A respondent commented that the ordering procedures should be revised to remind agencies that price reductions could be requested at any time for any size order.

*Councils' response:* Concur. Language was added to the final rule at FAR 8.404(d) reminding agencies that they can ask for price reductions prior to placing an order.

4. *Comment: Quality Assurance Surveillance Plans.* Several respondents raised concerns regarding the guidance on the use of Quality Assurance Surveillance Plans (QASP). The respondents felt that QASP should be required for all service orders regardless of whether the Statement of Work (SOW) is performance based or not. In addition, another respondent indicated that the proposed rule contains two different sections pertaining to QASP, which is redundant and confusing (see 8.404-2(c)(1) and (c)(4) of the proposed rule).

*Councils' response:* The Councils generally agreed with the observation that the mention of QASPs in two different places was, in fact, redundant and confusing. As a result, the rule was revised to include a reference to FAR Subpart 37.6. See FAR 8.405-2(b) of the final rule. With regard to the suggestion that QASPs be required for all service orders regardless of type, the Councils rejected this suggestion. There is no

FAR requirement that QASPs be developed for all service orders. The FAR only requires the development of QASPs for performance-based service orders.

5. *Comment: Blanket Purchase Agreements.* Several respondents commented that the requirement for each agency to be a signatory when establishing a multi-agency BPA was confusing.

*Councils' response:* The Councils agreed that the requirement for each agency using a multi-agency BPA to be a signatory to the BPA was unnecessary. The Councils revised the language to state that the agencies and their requirements must be identified in the BPA. The purpose of this change was two-fold; it eliminated the requirement that each agency actually sign the BPA while at the same time ensuring that the planned potential users of the BPA are reflected by including the user agencies' estimated requirements. Additionally, including information regarding the various agencies' estimated requirements fosters better pricing and enhances competition.

The Councils also added a new paragraph at 8.405-3(c) regarding the duration of BPAs. Over time, it has become apparent that additional guidance was needed on the length of BPAs. The underlying schedule contracts include a clause that allows BPAs to extend for the life of the contract. The supplemental guidance in the final rule advises agencies that a BPA should generally run for no longer than five years. However, BPAs may exceed five years to meet agency program requirements. The guidance further provides that a BPA can extend beyond the current term of the contract so long as there are option periods remaining on the underlying contract that, if exercised, will cover the BPA's period of performance. The rule requires that an ordering activity review the BPA at least once per year.

6. *Comment: Small business.* Several respondents raised concerns regarding the ability of agencies to focus their consideration of contractors and their competitions for orders on small businesses. In particular, the Federal Office of Small Disadvantaged Business Utilization (OSDBU) Directors Interagency Council commented that the rule of two should apply to schedule orders and that all orders between \$2,500 and \$100,000 be restricted to small businesses. In addition, another respondent stated that the language regarding the applicability of Part 19 of the FAR needed to be clarified. Another respondent suggested that a 10 percent price evaluation advantage be given to

small businesses when agencies are placing orders.

*Councils' response:* The Councils do not concur with the comment that the rule of two should apply to orders under the schedules program. Further, the Councils do not concur with the suggestion that all orders under \$100,000 be set-aside for small business. The Councils concluded that these suggestions would fundamentally alter the schedules program in terms of the efficiency and effectiveness of the overall program by increasing the administrative burden on agencies without having demonstrated that the changes would, in fact, benefit small business over the long term. In addition, the basic statutory authority for the program provides that contracts and orders be open to all sources. Creating a set-aside for all such orders would be inconsistent with the program's basic operating authorities. In addition, the Councils, for the same general reasons, do not agree with the request for a 10 percent evaluation preference for small business.

However, the Councils did examine ways in which the rule could foster even greater small business participation than that which already exists. The Councils added language at FAR 8.405-5(b) that provides that "Ordering activities may consider socioeconomic status when identifying contractor(s) for consideration or competition for award of an order or BPA." This language provides the flexibility for agencies to conduct their market research focusing on small business concerns and providing them greater opportunity to compete for orders.

The Councils also clarified the language at FAR 8.405-5(a) regarding the applicability of FAR Part 19 and added language that reminds agencies that when reporting an order for purposes of credit towards their socioeconomic goals, the ordering agency may only take credit if the awardee meets the size standard that corresponds to the work performed.

7. *Comments: Documentation requirements.* Several respondents indicated that the documentation requirements at FAR 8.404-6 of the proposed rule were confusing.

*Councils' response:* The Councils agreed with these comments and revised the rule accordingly. The Councils moved the documentation for services requiring a statement of work from the end of the section to the beginning consolidating minimum documentation requirements for services under FAR 8.405-7(a) and (b) of the final rule. In addition, the sole source document



requirements were placed in a separate heading at FAR 8.405-6 of the final rule. A final note, proposed rule FAR 8.404-6 is renumbered in the final rule as FAR 8.405-7.

**8. Comment: Inspection and acceptance.** One respondent raised significant concerns regarding the inspection and acceptance guidance at FAR 8.405-3 of the proposed rule. The respondent commented that the new provisions regarding the inspection rights of the Government for services were overly broad and unduly burdensome. The provisions provided in part that the Government had the right to inspect services performed at any time and any place, including the contractor's facilities. The respondent indicated that inspection and acceptance are typically negotiated based on the type of service to be provided and are not left so open-ended in the Government's favor.

**Councils' response:** The Councils essentially agreed with the respondent's observations. As a result, the Councils revised the final rule at FAR 8.406-2(b) to state that inspection shall be in accordance with the contract and order terms. The order terms can be negotiated as part of a Quality Assurance Surveillance Plan for an order.

**9. Comment: Remedies for inadequate performance.** One respondent raised several concerns regarding the remedies for inadequate performance guidance included in the proposed rule. In cases where a contractor fails to correct earlier nonperformance of an order, FAR 8.405-4(c) of the proposed rule provided, in part, that the contracting office could reduce the order price to reflect the contractor nonperformance. The respondent commented that FAR 8.405-4(c) of the proposed rule would inappropriately grant agencies the unilateral right to reduce the order price without any mechanisms by which the contracting officer determines the amount of any such price reduction or any mechanism by which the contractor could challenge such a price reduction.

**Councils' response:** The Councils agreed with this comment. The Councils replaced the term "inadequate performance" in the heading with "nonconformance" and revised the rule at FAR 8.406-3(a) to state that the ordering activity shall take appropriate action for nonconformance in accordance with the inspection and acceptance clause of the contract as supplemented by the order.

**10. Comment: Outline factors to consider for services.** Section 8.404-1(c) outlines factors to consider when comparing schedule contractors, which

mainly apply to supplies. Recommend that a factor be added for services.

**Councils' response:** Do not concur. The language of section 8.405-1(c) is sufficient for purposes of a best value evaluation of basic services such as repair, maintenance, and installation. Section 8.405-1 lists various factors as examples of what may be considered in determining best value. The list is written to be inclusive and not exclusive. Therefore, agencies have the discretion to consider any other factor that may be important to their best value decision. In addition, the ordering procedures for services requiring a statement of work require that agencies include the evaluation criteria for selection in the Request for Quotation. Under these ordering procedures, the agencies have the discretion to develop the evaluation criteria that will best meet their needs in determining best value for their requirements.

**11. Comment: Other direct costs.** One respondent commented that the ordering procedures should include guidance regarding the acquisition and evaluation of other direct costs as part of an order.

**Councils' response:** The Councils agree that this is an area that may need additional guidance. However, GSA is currently reviewing the structure for other direct costs under its contracts and will be developing additional training and guidance in this area for agencies. Upon completion of this review, the Councils may revisit the issue as a follow-up to the final rule.

**12. Comment: Time-and-materials and labor-hour orders.** Several respondents raised concerns regarding the lack of clear guidance on the use of time-and-materials or labor-hour orders. The general comment was that the rule failed to fully address whether an order could be issued on a time-and-material or labor-hour basis and the circumstances when the use of such order types was appropriate. In addition, one respondent raised a concern regarding a potential conflict between the FAR and GSA ordering procedures regarding the type of contract that may be used for commercial items. Yet another respondent commented that time-and-materials contracts should not be used unless impossible to estimate accurately the extent or duration of the work or anticipate costs reasonably when placing the order.

**Councils' response:** The Councils agree with the comments that this area requires additional guidance. Currently, the Councils are working on a number of FAR cases to implement various sections of the Services Acquisition

Reform Act of 2003 (Title XIV of Public Law 108-136). The rule resulting from one of these FAR cases will implement Section 1432 (Authorization of additional commercial contracts types), which addresses the use of time-and-material and labor-hour contracts for commercial services. When Section 1432 has been implemented, the Councils will address the time-and-materials/labor-hour issue as it pertains to the Multiple Award Schedules Program as a follow-up to the final rule.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### C. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this final rule. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA), and it reads as follows:

This Final Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 604.

1. Statement of need for, and objectives of, the rule. The Multiple Award Schedules (MAS) program, directed and managed by the General Services Administration (GSA), provides Federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. For much of its history, the MAS focused on the sale of products. In recent years, however, GSA has sought to facilitate broad access to service contractors. This general transformation of the schedules program has coincided with a trend in Federal procurement towards acquiring managed solutions from the marketplace. The amount of services acquisition from the MAS has grown steadily as agencies increasingly turn to schedule contractors to meet their needs.

To assist its customers, GSA developed "special ordering procedures" that address the acquisition of services. However, because FAR Subpart 8.4 has remained primarily geared towards products, agencies have been inconsistent in adhering to certain basic acquisition requirements when buying services off the MAS, such as in their use of statements of work, effective pricing of orders, application of competition, and proper documentation of award decisions.

The purpose of the rule is to significantly improve the application of acquisition basics on MAS purchases for services and reinforce sound MAS practices generally. To achieve this result, the rule is amending the Federal Acquisition Regulation to incorporate policies for services and to strengthen the procedures for establishing Blanket Purchase Agreements under the Federal Supply Schedules.

2. Summary of significant issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis (IRFA).

a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments. An Initial Regulatory Flexibility Analysis was not performed because the proposed rule did not have significant economic impact on a substantial number of small entities. Thirty-four respondents submitted public comments in response to the proposed rule. None of the comments received identified or addressed any adverse impact on small businesses.

However, the final rule does make an amendment to the FAR that could foster even greater small business participation than that which already exists. The amendment provides the flexibility for agencies to conduct their market research focusing on small business concerns and providing them greater opportunity to compete for orders.

The rule also reminds agencies that when reporting an order for purposes of credit towards their socio-economic goals, the ordering agency may only take credit if the awardee meets the size standard that corresponds to the work performed. This final rule is intended to be beneficial in expanding small business access to an increased number of orders. We see no negative impact on small businesses.

3. Description of, and an estimate of the number of, small entities to which the rule will apply or an explanation of why no such estimate is available. This rule will apply to all large and small business concerns under the Federal Supply Schedule Program. Although the rule pertains to internal Government procedures, it may increase the number of orders for supplies and services placed by the Government with small business concerns. The net effect of the rule is unknown at this time.

As of fiscal year 2003, according to statistical data maintained by GSA's Federal Supply Service, out of a population of 14,169 national scope schedule contracts, 11,300 Federal Supply Schedule contracts are in effect with small business concerns. Approximately 80 percent of the schedule contractors are small business concerns. In fiscal year 2003, small business schedule contractors received approximately \$9 billion, or 36 percent of total schedule sales. Whereas, in 2002, 8,963 small businesses held contracts out of a population of 11,426 national scope schedule contracts. Small business sales in 2002 were \$7.2 billion, or 34 percent of total schedule sales. The number of small businesses holding Federal Supply Schedules increased 26 percent and sales increased 26.4 percent.

The procedures give small business contractors the opportunity to fairly compete within the broader universe of schedule contractors. These changes ensure that ordering activities have the broad discretion and effective and flexible business solutions to meet agency requirements.

4. Description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record. There are no projected reporting, recordkeeping, or other compliance requirements.

5. Description of steps the agency has taken to minimize significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency was rejected. There are no known significant alternatives that will accomplish the objectives of the rule. No alternatives were proposed during the public comment period. The impact of the rule is unknown at this time. The rule could benefit small business concerns holding schedule contracts by permitting those concerns to compete for awards that offer products and services that meet the needs of the requiring agency.

The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

#### D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### List of Subjects in 48 CFR Parts 8, 38, and 53

Government procurement.

Dated: June 10, 2004.

Ralph De Stefano,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 8, 38, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 8, 38, and 53 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

#### PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 2. Revise Subpart 8.4 to read as follows:

##### Subpart 8.4—Federal Supply Schedules

- Sec.
- 8.401 Definitions.
- 8.402 General.
- 8.403 Applicability.
- 8.404 Use of Federal Supply Schedules.
- 8.405 Ordering procedures for Federal Supply Schedules.
- 8.405-1 Ordering procedures for supplies, and services not requiring a statement of work.
- 8.405-2 Ordering procedures for services requiring a statement of work.
- 8.405-3 Blanket purchase agreements (BPAs).
- 8.405-4 Price reductions.
- 8.405-5 Small business.

- 8.405-6 Sole source justification and approval.
- 8.405-7 Documentation.
- 8.405-8 Payment.
- 8.406 Ordering activity responsibilities.
- 8.406-1 Order placement.
- 8.406-2 Inspection and acceptance.
- 8.406-3 Remedies for nonconformance.
- 8.406-4 Termination for cause.
- 8.406-5 Termination for the Government's convenience.
- 8.406-6 Disputes.

#### 8.401 Definitions.

As used in this subpart—

**Ordering activity** means an activity that is authorized to place orders, or establish blanket purchase agreements (BPA), against the General Services Administration's (GSA) Multiple Award Schedule contracts. A list of eligible ordering activities is available at <http://www.gsa.gov/schedules> (click "For Customers Ordering from Schedules" and then "Eligibility to Use GSA Sources").

**Multiple Award Schedule (MAS)** means contracts awarded by GSA or the Department of Veterans Affairs (VA) for similar or comparable supplies, or services, established with more than one supplier, at varying prices. The primary statutory authority for the MAS program is derived from both Title III of the Administrative Services Act of 1949 (41 U.S.C. 251, *et seq.*) and Title 40 U.S.C., Public Buildings, Property and Works.

**Requiring agency** means the agency needing the supplies or services.

**Schedules e-Library** means the on-line source for GSA and VA Federal Supply Schedule contract award information. Schedules e-Library may be accessed at <http://www.gsa.gov/elibrary>.

**Special Item Number (SIN)** means a group of generically similar (but not identical) supplies or services that are intended to serve the same general purpose or function.

#### 8.402 General.

(a) The Federal Supply Schedule program is also known as the GSA Schedules Program or the Multiple Award Schedule Program. The Federal Supply Schedule program is directed and managed by GSA and provides Federal agencies (see 8.002) with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. Indefinite delivery contracts are awarded to provide supplies and services at stated prices for given periods of time. GSA may delegate certain responsibilities to other agencies (e.g., GSA has delegated authority to the VA to procure medical supplies under the VA Federal Supply Schedules program). Orders issued under the VA

Federal Supply Schedule program are covered by this subpart. Additionally, the Department of Defense (DoD) manages similar systems of schedule-type contracting for military items; however, DoD systems are not covered by this subpart.

(b) GSA schedule contracts require all schedule contractors to publish an "Authorized Federal Supply Schedule Pricelist" (pricelist). The pricelist contains all supplies and services offered by a schedule contractor. In addition, each pricelist contains the pricing and the terms and conditions pertaining to each Special Item Number that is on schedule. The schedule contractor is required to provide one copy of its pricelist to any ordering activity upon request. Also, a copy of the pricelist may be obtained from the Federal Supply Service by submitting a written e-mail request to [schedules.infocenter@gsa.gov](mailto:schedules.infocenter@gsa.gov) or by telephone at 1-800-488-3111. This subpart, together with the pricelists, contain necessary information for placing delivery or task orders with schedule contractors. In addition, the GSA schedule contracting office issues Federal Supply Schedules publications that contain a general overview of the Federal Supply Schedule (FSS) program and address pertinent topics. Ordering activities may request copies of schedules publications by contacting the Centralized Mailing List Service through the Internet at <http://www.gsa.gov/cmls>, submitting written e-mail requests to [CMLS@gsa.gov](mailto:CMLS@gsa.gov); or by completing GSA Form 457, FSS Publications Mailing List Application, and mailing it to the GSA Centralized Mailing List Service (7SM), P.O. Box 6477, Fort Worth, TX 76115. Copies of GSA Form 457 may also be obtained from the above-referenced points of contact.

(c)(1) GSA offers an on-line shopping service called "GSA Advantage!" through which ordering activities may place orders against Schedules. (Ordering activities may also use GSA Advantage! to place orders through GSA's Global Supply System, a GSA wholesale supply source, formerly known as "GSA Stock" or the "Customer Supply Center." FAR Subpart 8.4 is not applicable to orders placed through the GSA Global Supply System.) Ordering activities may access GSA Advantage! through the GSA Federal Supply Service Home Page (<http://www.gsa.gov/fss>) or the GSA Federal Supply Schedule Home Page at <http://www.gsa.gov/schedules>.

(2) GSA Advantage! enables ordering activities to search specific information (i.e., national stock number, part

number, common name), review delivery options, place orders directly with Schedule contractors and pay for orders using the Governmentwide commercial purchase card.

(d) *e-Buy*, GSA's electronic Request for Quotation (RFQ) system, is a part of a suite of on-line tools which complement GSA Advantage!. *E-Buy* allows ordering activities to post requirements, obtain quotes, and issue orders electronically. Ordering activities may access *e-Buy* at <http://www.ebuy.gsa.gov>. For more information or assistance on either GSA Advantage! or *e-Buy*, contact GSA at Internet e-mail address [gsa.advantage@gsa.gov](mailto:gsa.advantage@gsa.gov).

(e) For more information or assistance regarding the Federal Supply Schedule Program, review the following Web site: <http://www.gsa.gov/schedules>. Additionally, for on-line training courses regarding the Schedules Program, review the following Web site: <http://fsstraining.gsa.gov>.

(f) For administrative convenience, an ordering activity contracting officer may add items not on the Federal Supply Schedule (also referred to as open market items) to a Federal Supply Schedule blanket purchase agreement (BPA) or an individual task or delivery order only if—

(1) All applicable acquisition regulations pertaining to the purchase of the items not on the Federal Supply Schedule have been followed (e.g., publicizing (Part 5), competition requirements (Part 6), acquisition of commercial items (Part 12), contracting methods (Parts 13, 14, and 15), and small business programs (Part 19));

(2) The ordering activity contracting officer has determined the price for the items not on the Federal Supply Schedule is fair and reasonable;

(3) The items are clearly labeled on the order as items not on the Federal Supply Schedule; and

(4) All clauses applicable to items not on the Federal Supply Schedule are included in the order.

#### 8.403 Applicability.

(a) Procedures in this subpart apply to—

(1) Individual orders for supplies or services placed against Federal Supply Schedules contracts; and

(2) BPAs established against Federal Supply Schedule contracts.

(b) GSA may establish special ordering procedures for a particular schedule. In this case, that schedule will specify those special ordering procedures. Unless otherwise noted, special ordering procedures established for a Federal Supply Schedule take

precedence over the procedures in 8.405.

#### 8.404 Use of Federal Supply Schedules.

(a) *General*. Parts 13 (except 13.303–2(c)(3)), 14, 15, and 19 (except for the requirement at 19.202–1(e)(1)(iii)) do not apply to BPAs or orders placed against Federal Supply Schedules contracts (but see 8.405–5). BPAs and orders placed against a MAS, using the procedures in this subpart, are considered to be issued using full and open competition (see 6.102(d)(3)). Therefore, when establishing a BPA (as authorized by 13.303–2(c)(3)), or placing orders under Federal Supply Schedule contracts using the procedures of 8.405, ordering activities shall not seek competition outside of the Federal Supply Schedules or synopses the requirement.

(b) The contracting officer, when placing an order or establishing a BPA, is responsible for applying the regulatory and statutory requirements applicable to the agency for which the order is placed or the BPA is established. The requiring agency shall provide the information on the applicable regulatory and statutory requirements to the contracting officer responsible for placing the order.

(c) *Acquisition planning*. Orders placed under a Federal Supply Schedule contract—

(1) Are not exempt from the development of acquisition plans (see subpart 7.1), and an information technology acquisition strategy (see Part 39);

(2) Must comply with all FAR requirements for a bundled contract when the order meets the definition of "bundled contract" (see 2.101(b)); and

(3) Must, whether placed by the requiring agency, or on behalf of the requiring agency, be consistent with the requiring agency's statutory and regulatory requirements applicable to the acquisition of the supply or service.

(d) *Pricing*. Supplies offered on the schedule are listed at fixed prices. Services offered on the schedule are priced either at hourly rates, or at a fixed price for performance of a specific task (e.g., installation, maintenance, and repair). GSA has already determined the prices of supplies and fixed-price services, and rates for services offered at hourly rates, under schedule contracts to be fair and reasonable. Therefore, ordering activities are not required to make a separate determination of fair and reasonable pricing, except for a price evaluation as required by 8.405–2(d). By placing an order against a schedule contract using the procedures in 8.405, the ordering activity has

concluded that the order represents the best value (as defined in FAR 2.101) and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs. Although GSA has already negotiated fair and reasonable pricing, ordering activities may seek additional discounts before placing an order (see 8.405-4).

#### **8.405 Ordering procedures for Federal Supply Schedules.**

Ordering activities shall use the ordering procedures of this section when placing an order or establishing a BPA for supplies or services. The procedures in this section apply to all schedules.

##### **8.405-1 Ordering procedures for supplies, and services not requiring a statement of work.**

(a) Ordering activities shall use the procedures of this subsection when ordering supplies and services that are listed in the schedules contracts at a fixed price for the performance of a specific task, where a statement of work is not required (e.g., installation, maintenance, and repair).

(b) *Orders at or below the micro-purchase threshold.* Ordering activities may place orders at, or below, the micro-purchase threshold with any Federal Supply Schedule contractor that can meet the agency's needs. Although not required to solicit from a specific number of schedule contractors, ordering activities should attempt to distribute orders among contractors.

(c) *Orders exceeding the micro-purchase threshold but not exceeding the maximum order threshold.* Ordering activities shall place orders with the schedule contractor that can provide the supply or service that represents the best value. Before placing an order, an ordering activity shall consider reasonably available information about the supply or service offered under MAS contracts by surveying the GSA Advantage! on-line shopping service, or by reviewing the catalogs or pricelists of at least three schedule contractors (see 8.405-5). In addition to price, when determining best value, the ordering activity may consider, among other factors, the following:

- (1) Past performance.
- (2) Special features of the supply or service required for effective program performance.
- (3) Trade-in considerations.
- (4) Probable life of the item selected as compared with that of a comparable item.
- (5) Warranty considerations.
- (6) Maintenance availability.

(7) Environmental and energy efficiency considerations.

(8) Delivery terms.

(d) *Orders exceeding the maximum order threshold.* Each schedule contract has a maximum order threshold established on a SIN-by-SIN basis. Although a price reduction may be sought at any time, this threshold represents the point where, given the dollar value of the potential order, the ordering activity shall seek a price reduction. In addition to following the procedures in paragraph (c) of this section and before placing an order that exceeds the maximum order threshold or establishing a BPA (see 8.405-3), ordering activities shall—

(1) Review the pricelists of additional schedule contractors (the GSA Advantage! on-line shopping service can be used to facilitate this review);

(2) Based upon the initial evaluation, seek price reductions from the schedule contractor(s) considered to offer the best value (see 8.404(d)); and

(3) After seeking price reductions (see 8.405-4), place the order with the schedule contractor that provides the best value. If further price reductions are not offered, an order may still be placed.

##### **8.405-2 Ordering procedures for services requiring a statement of work.**

(a) *General.* Ordering activities shall use the procedures in this subsection when ordering services priced at hourly rates as established by the schedule contracts. The applicable services will be identified in the Federal Supply Schedule publications and the contractor's pricelists.

(b) *Statements of Work (SOWs).* All Statements of Work shall include the work to be performed; location of work; period of performance; deliverable schedule; applicable performance standards; and any special requirements (e.g., security clearances, travel, special knowledge). To the maximum extent practicable, agency requirements shall be performance-based statements (see subpart 37.6).

(c) *Request for Quotation procedures.* The ordering activity must provide the Request for Quotation (RFQ), which includes the statement of work and evaluation criteria (e.g., experience and past performance), to schedule contractors that offer services that will meet the agency's needs. The RFQ may be posted to GSA's electronic RFQ system, e-Buy (see 8.402(d)).

(1) *Orders at, or below, the micro-purchase threshold.* Ordering activities may place orders at, or below, the micro-purchase threshold with any Federal Supply Schedule contractor that

can meet the agency's needs. The ordering activity should attempt to distribute orders among contractors.

(2) *For orders exceeding the micro-purchase threshold, but not exceeding the maximum order threshold.* (i) The ordering activity shall develop a statement of work, in accordance with 8.405-2(b).

(ii) The ordering activity shall provide the RFQ (including the statement of work and evaluation criteria) to at least three schedule contractors that offer services that will meet the agency's needs.

(iii) The ordering activity should request that contractors submit firm-fixed prices to perform the services identified in the statement of work.

(3) *For proposed orders exceeding the maximum order threshold or when establishing a BPA.* In addition to meeting the requirements of 8.405-2(c)(2), the ordering activity shall—

(i) Provide the RFQ (including the statement of work and evaluation criteria) to additional schedule contractors that offer services that will meet the needs of the ordering activity. When determining the appropriate number of additional schedule contractors, the ordering activity may consider, among other factors, the following:

- (A) The complexity, scope and estimated value of the requirement.
- (B) The market search results.

(ii) Seek price reductions.

(4) The ordering activity shall provide the RFQ (including the statement of work and the evaluation criteria) to any schedule contractor who requests a copy of it.

(d) *Evaluation.* The ordering activity shall evaluate all responses received using the evaluation criteria provided to the schedule contractors. The ordering activity is responsible for considering the level of effort and the mix of labor proposed to perform a specific task being ordered, and for determining that the total price is reasonable. Place the order, or establish the BPA, with the schedule contractor that represents the best value (see 8.404(d)). After award, ordering activities should provide timely notification to unsuccessful offerors. If an unsuccessful offeror requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the award decision shall be provided.

##### **8.405-3 Blanket purchase agreements (BPAs).**

(a)(1) *Establishment.* Ordering activities may establish BPAs under any schedule contract to fill repetitive needs for supplies or services. BPAs may be

established with one or more schedule contractors. The number of BPAs to be established is within the discretion of the ordering activity establishing the BPAs and should be based on a strategy that is expected to maximize the effectiveness of the BPA(s). In determining how many BPAs to establish, consider—

- (i) The scope and complexity of the requirement(s);
- (ii) The need to periodically compare multiple technical approaches or prices;
- (iii) The administrative costs of BPAs; and
- (iv) The technical qualifications of the schedule contractor(s).

(2) Establishment of a single BPA, or multiple BPAs, shall be made using the same procedures outlined in 8.405-1 or 8.405-2. BPAs shall address the frequency of ordering, invoicing, discounts, requirements (*e.g.* estimated quantities, work to be performed), delivery locations, and time.

(3) When establishing multiple BPAs, the ordering activity shall specify the procedures for placing orders under the BPAs.

(4) Establishment of a multi-agency BPA against a Federal Supply Schedule contract is permitted if the multi-agency BPA identifies the participating agencies and their estimated requirements at the time the BPA is established.

(b) *Ordering from BPAs*—(1) *Single BPA*. If the ordering activity establishes one BPA, authorized users may place the order directly under the established BPA when the need for the supply or service arises.

(2) *Multiple BPAs*. If the ordering activity establishes multiple BPAs, before placing an order exceeding the micro-purchase threshold, the ordering activity shall—

- (i) Forward the requirement, or statement of work and the evaluation criteria, to an appropriate additional number of BPA holders, as established in the BPA ordering procedures; and
- (ii) Evaluate the responses received, make a best value determination (see 8.404(d)), and place the order with the BPA holder that represents the best value.

(3) *BPAs for hourly rate services*. If the BPA is for hourly rate services, the ordering activity shall develop a statement of work for requirements covered by the BPA. All orders under the BPA shall specify a price for the performance of the tasks identified in the statement of work.

(c) *Duration of BPAs*. BPAs generally should not exceed five years in length, but may do so to meet program requirements. Contractors may be

awarded BPAs that extend beyond the current term of their GSA Schedule contract, so long as there are option periods in their GSA Schedule contract that, if exercised, will cover the BPA's period of performance.

(d) *Review of BPAs*. (1) The ordering activity that established the BPA shall review it at least once a year to determine whether—

- (i) The schedule contract, upon which the BPA was established, is still in effect;
- (ii) The BPA still represents the best value (see 8.404(d)); and
- (iii) Estimated quantities/amounts have been exceeded and additional price reductions can be obtained.

(2) The ordering activity shall document the results of its review.

#### 8.405-4 Price reductions.

In addition to seeking price reductions before placing an order exceeding the maximum order threshold (see 8.405-1(d)), or in conjunction with the annual BPA review, there may be other reasons to request a price reduction. For example, ordering activities should seek a price reduction when the supply or service is available elsewhere at a lower price, or when establishing a BPA to fill recurring requirements. The potential volume of orders under BPAs, regardless of the size of individual orders, offers the opportunity to secure greater discounts. Schedule contractors are not required to pass on to all schedule users a price reduction extended only to an individual ordering activity for a specific order.

#### 8.405-5 Small business.

(a) Although the mandatory preference programs of Part 19 do not apply, orders placed against schedule contracts may be credited toward the ordering activity's small business goals. For purposes of reporting an order placed with a small business schedule contractor, an ordering agency may only take credit if the awardee meets a size standard that corresponds to the work performed. Ordering activities should rely on the small business representations made by schedule contractors at the contract level.

(b) Ordering activities may consider socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA. At a minimum, ordering activities should consider, if available, at least one small business, veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business

schedule contractor(s). GSA Advantage! and Schedules e-Library at <http://www.gsa.gov/fss> contain information on the small business representations of Schedule contractors.

(c) For orders exceeding the micro-purchase threshold, ordering activities should give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement.

#### 8.405-6 Sole source justification and approval.

Orders placed under Federal Supply Schedules are exempt from the requirements in Part 6. However, ordering activities shall—

(a) Procure sole source requirements under this subpart only if the need to do so is justified in writing and approved at the levels specified in paragraph (b) of this section; and

(b) Prepare sole source justifications using the information at 6.303-2, modified to cite that the acquisition is conducted under the authority of Section 201 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 501).

(1) For proposed orders exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold, the ordering activity contracting officer may solicit from one source, if the ordering activity contracting officer determines that the circumstances deem only one source is reasonably available (*e.g.*, urgency, exclusive licensing agreement, industrial mobilization). The contracting officer shall approve the justification unless a higher approval level is established in accordance with agency procedures.

(2) For proposed orders exceeding the simplified acquisition threshold, but not exceeding \$500,000, the ordering activity contracting officer's certification that the justification is accurate and complete to the best of the ordering activity contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in accordance with agency procedures.

(3) For a proposed order exceeding \$500,000, but not exceeding \$10 million, the competition advocate for the procuring activity, designated pursuant to 6.501, or an official described in 6.304(a)(3) or (a)(4) must approve the justification. This authority is not delegable.

(4) For a proposed order exceeding \$10 million but not exceeding \$50 million, the head of the procuring activity or an official described in 6.304(a)(3)(i) or (ii) shall approve the

justification. This authority is not delegable.

(5) For a proposed order exceeding \$50 million, the official described in 6.304(a)(4) shall approve the justification. This authority is not delegable, except as provided in 6.304(a)(4).

#### 8.405-7 Documentation.

(a) *Minimum documentation.* The ordering activity shall document—

(1) The contracts considered, noting the contractor from which the supply or service was purchased;

(2) A description of the supply or service purchased;

(3) The amount paid; and

(4) If applicable, the circumstances and rationale for restricting consideration of schedule contractors to fewer than that required in 8.405-1 or 8.405-2 (see 8.405-6). Justifications for such restrictions may include—

(i) Only one source is capable of responding due to the unique or specialized nature of the work;

(ii) The new work is a logical follow-on to an existing order provided that the original order was placed in accordance with 8.405-1 or 8.405-2 (excluding orders placed previously under sole source requirements);

(iii) The item is peculiar to one manufacturer. A brand name item, available on various schedule contracts, is an item peculiar to one manufacturer; or

(iv) An urgent and compelling need exists and following the ordering procedures would result in unacceptable delays.

(b) *Additional documentation for services.* In addition to the documentation requirements of paragraph (a) of this section, when acquiring services using the procedures at 8.405-2, the ordering office shall also document—

(1) The evaluation methodology used in selecting the contractor to receive the order;

(2) The rationale for any tradeoffs in making the selection;

(3) The price reasonableness determination required by 8.405-2(d); and

(4) The rationale for using other than—

(i) A firm-fixed price order; or

(ii) A performance-based order.

#### 8.405-8 Payment.

Agencies may make payments for oral or written orders by any authorized means, including the Governmentwide commercial purchase card.

#### 8.406 Ordering activity responsibilities.

##### 8.406-1 Order placement.

Ordering activities may place orders orally (except for services requiring a statement of work (SOW)) or use Optional Form 347, an agency-prescribed form, or an established electronic communications format to order supplies or services from schedule contracts. The ordering activity shall place an order directly with the contractor in accordance with the terms and conditions of the pricelists (see 8.402(b)). Prior to placement of the order, the ordering activity shall ensure that the regulatory and statutory requirements of the requiring agency have been applied. Orders shall include the following information in addition to any information required by the schedule contract:

(a) Complete shipping and billing addresses.

(b) Contract number and date.

(c) Agency order number.

(d) F.o.b. delivery point; *i.e.*, origin or destination.

(e) Discount terms.

(f) Delivery time or period of performance.

(g) Special item number or national stock number.

(h) A statement of work for services, when required, or a brief, complete description of each item (when ordering by model number, features and options such as color, finish, and electrical characteristics, if available, must be specified).

(i) Quantity and any variation in quantity.

(j) Number of units.

(k) Unit price.

(l) Total price of order.

(m) Points of inspection and acceptance.

(n) Other pertinent data; *e.g.*, delivery instructions or receiving hours and size-of-truck limitation.

(o) Marking requirements.

(p) Level of preservation, packaging, and packing.

##### 8.406-2 Inspection and acceptance.

(a) *Supplies.* (1) Consignees shall inspect supplies at destination except when—

(i) The schedule contract indicates that mandatory source inspection is required by the schedule contracting agency; or

(ii) A schedule item is covered by a product description, and the ordering activity determines that the schedule contracting agency's inspection assistance is needed (based on the ordering volume, the complexity of the supplies, or the past performance of the supplier).

(2) When the schedule contracting agency performs the inspection, the ordering activity will provide two copies of the order specifying source inspection to the schedule contracting agency. The schedule contracting agency will notify the ordering activity of acceptance or rejection of the supplies.

(3) Material inspected at source by the schedule contracting agency, and determined to conform with the product description of the schedule, shall not be reinspected for the same purpose. The consignee shall limit inspection to kind, count, and condition on receipt.

(4) Unless otherwise provided in the schedule contract, acceptance is conclusive, except as regards latent defects, fraud, or such gross mistakes as amount to fraud.

(b) *Services.* The ordering activity has the right to inspect all services in accordance with the contract requirements and as called for by the order. The ordering activity shall perform inspections and tests as specified in the order's quality assurance surveillance plan in a manner that will not unduly delay the work.

##### 8.406-3 Remedies for nonconformance.

(a) If a contractor delivers a supply or service, but it does not conform to the order requirements, the ordering activity shall take appropriate action in accordance with the inspection and acceptance clause of the contract, as supplemented by the order.

(b) If the contractor fails to perform an order, or take appropriate corrective action, the ordering activity may terminate the order for cause or modify the order to establish a new delivery date (after obtaining consideration, as appropriate). Ordering activities shall follow the procedures at 8.406-4 when terminating an order for cause.

##### 8.406-4 Termination for cause.

(a)(1) An ordering activity contracting officer may terminate individual orders for cause. Termination for cause shall comply with FAR 12.403, and may include charging the contractor with excess costs resulting from repurchase.

(2) The schedule contracting office shall be notified of all instances where an ordering activity contracting officer has terminated for cause an individual order to a Federal Supply Schedule contractor, or if fraud is suspected.

(b) If the contractor asserts that the failure was excusable, the ordering activity contracting officer shall follow the procedures at 8.406-6, as appropriate.

(c) If the contractor is charged excess costs, the following apply:



(1) Any repurchase shall be made at as low a price as reasonable, considering the quality required by the Government, delivery requirement, and administrative expenses. Copies of all repurchase orders, except the copy furnished to the contractor or any other commercial concern, shall include the notation:

Repurchase against the account of \_\_\_\_\_  
[insert contractor's name] under Order \_\_\_\_\_  
[insert number] under Contract \_\_\_\_\_ [insert number].

(2) When excess costs are anticipated, the ordering activity may withhold funds due the contractor as offset security. Ordering activities shall minimize excess costs to be charged against the contractor and collect or set-off any excess costs owed.

(3) If an ordering activity is unable to collect excess repurchase costs, it shall notify the schedule contracting office after final payment to the contractor.

(i) The notice shall include the following information about the terminated order:

(A) Name and address of the contractor.

(B) Schedule, contract, and order number.

(C) National stock or special item number(s), and a brief description of the item(s).

(D) Cost of schedule items involved.

(E) Excess costs to be collected.

(F) Other pertinent data.

(ii) The notice shall also include the following information about the purchase contract:

(A) Name and address of the contractor.

(B) Item repurchase cost.

(C) Repurchase order number and date of payment.

(D) Contract number, if any.

(E) Other pertinent data.

(d) Only the schedule contracting officer may modify the contract to terminate for cause any, or all, supplies or services covered by the schedule contract. If the schedule contracting officer has terminated any supplies or services covered by the schedule contract, no further orders may be placed for those items. Orders placed prior to termination for cause shall be fulfilled by the contractor, unless terminated for the convenience of the Government by the ordering activity contracting officer.

#### **8.406-5 Termination for the Government's convenience.**

(a) An ordering activity contracting officer may terminate individual orders for the Government's convenience. Terminations for the Government's convenience shall comply with FAR 12.403.

(b) Before terminating orders for the Government's convenience, the ordering activity contracting officer shall endeavor to enter into a "no cost" settlement agreement with the contractor.

(c) Only the schedule contracting officer may modify the schedule contract to terminate any, or all, supplies or services covered by the schedule contract for the Government's convenience.

#### **8.406-6 Disputes.**

(a) *Disputes pertaining to the performance of orders under a schedule contract.* (1) Under the Disputes clause of the schedule contract, the ordering activity contracting officer may—

(i) Issue final decisions on disputes arising from performance of the order (but see paragraph (b) of this section); or

(ii) Refer the dispute to the schedule contracting officer.

(2) The ordering activity contracting officer shall notify the schedule contracting officer promptly of any final decision.

(b) *Disputes pertaining to the terms and conditions of schedule contracts.* The ordering activity contracting officer shall refer all disputes that relate to the contract terms and conditions to the schedule contracting officer for resolution under the Disputes clause of the contract and notify the schedule contractor of the referral.

(c) *Appeals.* Contractors may appeal final decisions to either the Board of Contract Appeals servicing the agency that issued the final decision or the U.S. Court of Federal Claims.

(d) *Alternative dispute resolution.* The contracting officer should use the alternative dispute resolution (ADR) procedures, to the maximum extent practicable (see 33.204 and 33.214).

#### **PART 38—FEDERAL SUPPLY SCHEDULE CONTRACTING**

■ 3. Revise section 38.000 to read as follows:

##### **38.000 Scope of part.**

This part prescribes policies and procedures for contracting for supplies and services under the Federal Supply Schedule program, which is directed and managed by the General Services Administration (see Subpart 8.4, Federal Supply Schedules, for additional information). GSA may delegate certain responsibilities to other agencies (e.g., GSA has delegated authority to the Department of Veterans Affairs (VA) to procure medical supplies under the VA Federal Supply Schedules Program). The VA Federal Supply Schedules

Program is covered by this subpart. Additionally, the Department of Defense manages a similar system of schedule contracting for military items; however, the Department of Defense systems are not a part of the Federal Supply Schedule program.

■ 4. Amend section 38.101 by revising paragraph (a) to read as follows:

##### **38.101 General.**

(a) The Federal Supply Schedule program, pursuant to 41 U.S.C. 259(b)(3)(A), provides Federal agencies with a simplified process of acquiring commercial supplies and services in varying quantities while obtaining volume discounts. Indefinite-delivery contracts are awarded using competitive procedures to firms. The firms provide supplies and services at stated prices for given periods of time, for delivery within a stated geographic area such as the 48 contiguous states, the District of Columbia, Alaska, Hawaii, and overseas. The schedule contracting office issues Federal Supply Schedule publications that contain a general overview of the Federal Supply Schedule (FSS) program and address pertinent topics.

\* \* \* \* \*

#### **PART 53—FORMS**

##### **53.213 [Amended]**

■ 5. Amend section 53.213 in paragraph (f)(4) by removing "8.405-2" and adding "8.406-1" in its place.

[FR Doc. 04-13622 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

#### **DEPARTMENT OF DEFENSE**

##### **GENERAL SERVICES ADMINISTRATION**

##### **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

##### **48 CFR Parts 22, 25, and 52**

[FAC 2001-24; FAR Case 2004-008; Item VI]

RIN 9000-AJ96

##### **Federal Acquisition Regulation; Designated Countries—New European Communities Member States**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council

(Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement a determination by the United States Trade Representative (USTR) under the Trade Agreements Act that suppliers from the 10 new member states of the European Communities (EC) (*i.e.*, the European Union) are eligible to participate in U.S. Government procurement under the terms and conditions of the World Trade Organization Government Procurement Agreement (WTO GPA).

**DATES:** *Effective Date:* June 18, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219-0202. Please cite FAC 2001-24, FAR case 2004-008.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

As of May 1, 2004, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia have joined the EC. The EC has notified the other WTO GPA parties of its intention that the WTO GPA is binding on the new EC Member States as of May 1, 2004. The USTR has determined under the Trade Agreements Act that suppliers from these countries are eligible to participate in U.S. Government procurement under the terms and conditions of the WTO GPA (69 FR 25654, May 7, 2004). Therefore, these countries have been added to the list of designated countries at FAR 25.003, 52.225-5, and 52.225-11, as well as the list of countries subject to the WTO GPA at FAR 22.1503 and 52.222-19. Corresponding changes have also been made to the clause dates in the list of clauses at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**B. Regulatory Flexibility Act**

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comments is not required. However, the Councils will consider comments from small entities

concerning the affected FAR Parts 22, 25, and 52 in accordance with 5 U.S.C. 610.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**List of Subjects in 48 CFR Parts 22, 25, and 52**

Government procurement.

Dated: June 10, 2004.

Ralph J. De Stefano,  
*Acting Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 22, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 22, 25, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS**

■ 2. Amend section 22.1503 by revising paragraph (b)(4) to read as follows:

**22.1503 Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor.**

\* \* \* \* \*

(b) \* \* \*

(4) Aruba, Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or the United Kingdom and the anticipated value of the acquisition is \$175,000 or more (see 25.403(b)).

\* \* \* \* \*

**PART 25—FOREIGN ACQUISITION**

**25.003 Definitions.**

■ 3. Amend section 25.003 in the definition "Designated country" by adding, in alphabetical order, the countries "Cyprus", "Czech Republic", "Estonia", "Hungary", "Latvia", "Lithuania", "Malta", "Poland", "Slovak Republic", and "Slovenia".

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

**52.212-5 [Amended]**

■ 4. Amend section 52.212-5 by revising the date of the clause to read "(Jun 2004)"; and by removing "(Jan 2004)" from paragraphs (b)(15) and (b)(24) of the clause and adding "(Jun 2004)" in their place.

**52.213-4 [Amended]**

■ 5. Amend section 52.213-4 by revising the date of the clause to read "(Jun 2004)"; and by removing "(Jan 2004)" from paragraph (b)(1)(i) of the clause and adding "(Jun 2004)" in its place.

■ 6. Amend section 52.222-19 by revising the date of the clause and paragraph (a)(4) of the clause to read as follows:

**52.222-19 Child Labor—Cooperation with Authorities and Remedies.**

\* \* \* \* \*

**Child Labor—Cooperation With Authorities and Remedies—(Jun 2004)**

(a) \* \* \*

(4) Aruba, Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or the United Kingdom and the anticipated value of the acquisition is \$175,000 or more.

\* \* \* \* \*

**52.225-5 [Amended]**

■ 7. Amend section 52.225-5 by revising the date of the clause to read "(Jun 2004)"; and in paragraph (a) of the clause, in the definition "Designated country", by adding, in alphabetical order, the countries "Cyprus", "Czech Republic", "Estonia", "Hungary", "Latvia", "Lithuania", "Malta", "Poland", "Slovak Republic", and "Slovenia".

**52.225-11 [Amended]**

■ 8. Amend section 52.225-11 by revising the date of the clause to read "(Jun 2004)"; and in paragraph (a) of the clause, in the definition "Designated country", by adding, in alphabetical order, the countries "Cyprus", "Czech Republic", "Estonia", "Hungary", "Latvia", "Lithuania", "Malta", "Poland", "Slovak Republic", and "Slovenia".

[FR Doc. 04-13623 Filed 6-17-04; 8:45 am]

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## DEPARTMENT OF DEFENSE

GENERAL SERVICES  
ADMINISTRATIONNATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION

## 48 CFR Part 25

[FAC 2001-24; FAR Case 2003-007; Item  
VII]

RIN 9000-AJ72

Federal Acquisition Regulation; Buy  
American Act—Nonavailable Articles

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to add certain food and textile items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality.

**DATES:** Effective Date: July 19, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219-0202. Please cite FAC 2001-24, FAR case 2003-007.

## SUPPLEMENTARY INFORMATION:

## A. Background

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 68 FR 54296, September 16, 2003. The proposed rule amended FAR 25.104(a), adding certain food and textile items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality.

The Councils received two responses to the proposed rule. One respondent opposed the rule because she does not think that the "American public" needs or wants these items. She believes that if we do not produce these items in the United States, then we should do without them. The Councils nonconcur with this comment. The Defense Logistics Agency has provided support for the need for these items and demonstrated non-availability. The Buy American Act does not require that we

"do without" items that are domestically nonavailable.

The second respondent fully supported the proposed rule. In addition, they provided a list of additional food items that are nonavailable in the United States. Evaluation of this additional list is outside the scope of this case.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the items being added to the list are not available from domestic sources.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

## List of Subjects in 48 CFR Part 25

Government procurement.

Dated: June 10, 2004.

Ralph J. De Stefano,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 25 as set forth below:

## PART 25—FOREIGN ACQUISITION

■ 1. The authority citation for 48 CFR part 25 is revised to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 25.104 in paragraph (a) by adding, in alphabetical order, the articles "Bamboo shoots," "Goat hair canvas," "Grapefruit sections, canned," "Modacrylic fur ruff," and "Water chestnuts," to read as follows:

## 25.104 Nonavailable articles.

(a) \* \* \*

* * *	* * *
Bamboo shoots	
* * *	* * *
Goat hair canvas	
Grapefruit sections, canned	
* * *	* * *

Modacrylic fur ruff.

\* \* \*

Water chestnuts.

\* \* \*

[FR Doc. 04-13624 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

## DEPARTMENT OF DEFENSE

GENERAL SERVICES  
ADMINISTRATIONNATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION

## 48 CFR Part 31

[FAC 2001-24; FAR Case 2002-006; Item  
VIII]

RIN 9000-AJ65

Federal Acquisition Regulation;  
Application of Cost Principles and  
Procedures and Accounting for  
Unallowable Costs

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise FAR 31.204, Application of principles and procedures, to improve clarity and structure.

**DATES:** Effective Date: July 19, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Edward Loeb, Policy Advisor, at (202) 501-0650. Please cite FAC 2001-24, FAR case 2002-006.

## SUPPLEMENTARY INFORMATION:

## A. Background

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at (68 FR 28108) on May 22, 2003, with request for comments. The rule proposed to amend FAR 31.204, Application of principles and procedures, and FAR 31.201-6, Accounting for unallowable costs. Nine respondents submitted comments; however, no comments related to FAR 31.204. Therefore, the Councils concluded that the proposed rule should be converted to a final rule without changes.

The proposed FAR rule also included proposed revisions to FAR 31.201-6, Accounting for unallowable costs. Due to significant changes made as a result of public comments received, the Councils have decided that the proposed revisions to FAR 31.201-6 will be published as a second proposed rule in a Federal Register notice under new FAR case 2004-006.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### B. Public Comments

There were no public comments received on section 31.204.

#### C. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principles and procedures discussed in this rule. For FY 2003, only 2.4 % of all contract actions were cost contracts awarded to small business.

#### D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### List of Subjects in 48 CFR Part 31

Government procurement.

Dated: June 10, 2004.

Ralph J. De Stefano,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 31 as set forth below:

#### PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 1. The authority citation for 48 CFR part 31 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 31.204 in the first sentence of paragraph (a) by removing "shall be allowed" and adding "are

allowable" in its place; by revising paragraph (b); and by redesignating paragraph (c) as paragraph (d) and adding a new paragraph (c) to read as follows:

#### 31.204 Application of principles and procedures.

\* \* \* \* \*

(b)(1) For the following subcontract types, costs incurred as reimbursements or payments to a subcontractor are allowable to the extent the reimbursements or payments are for costs incurred by the subcontractor that are consistent with this part:

(i) Cost-reimbursement.

(ii) Fixed-price incentive.

(iii) Price redeterminable (*i.e.*, fixed-price contracts with prospective price redetermination and fixed-ceiling-price contracts with retroactive price redetermination).

(2) The requirements of paragraph (b)(1) of this section apply to any tier above the first firm-fixed-price subcontract or fixed-price subcontract with economic price adjustment provisions.

(c) Costs incurred as payments under firm-fixed-price subcontracts or fixed-price subcontracts with economic price adjustment provisions or modifications thereto, for which subcontract cost analysis was performed are allowable if the price was negotiated in accordance with 31.102.

\* \* \* \* \*

[FR Doc. 04-13625 Filed 6-17-04; 8:45 am]

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#### DEPARTMENT OF DEFENSE

#### GENERAL SERVICES ADMINISTRATION

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Part 31

[FAC 2001-24; FAR Case 2002-008; Item IX]

RIN 9000-AJ69

#### Federal Acquisition Regulation; Gains and Losses, Maintenance and Repair Costs, and Material Costs

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council

(Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) by deleting the cost principle regarding maintenance and repair costs, and revising the cost principles regarding contingencies, material costs, and training and education costs. The rule revises the cost principles by improving clarity and structure, and removing unnecessary and duplicative language. The revisions are intended to amend the FAR regarding contract cost principles and procedures in light of the evolution of generally accepted accounting principles (GAAP), the advent of acquisition reform, and experience gained from implementation of the FAR regarding contract cost principles and procedures.

DATES: Effective Date: July 19, 2004.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Edward Loeb at (202) 501-0650. Please cite FAC 2001-24, FAR case 2002-008.

#### SUPPLEMENTARY INFORMATION:

#### A. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 68 FR 40466, July 7, 2003, with request for comments. Three respondents submitted comments on the proposed FAR rule. A discussion of the comments related to FAR 31.205-24 and 31.205-26 are provided below. The Councils considered all comments and concluded that the proposed rule should be converted to a final rule, with minor changes to the proposed rule. Differences between the proposed rule and final rule are discussed in Section B, Comment 2, below.

In addition to the above, the proposed FAR rule also included proposed revisions to FAR 31.205-16, Gains and losses on disposition or impairment of depreciable property or other capital assets. Due to significant changes made as a result of public comments received, the Councils have decided that the proposed revisions to the FAR 31.205-16 cost principle will be published as a second proposed rule in a Federal Register notice under FAR case 2004-005.

#### B. Public Comments

FAR 31.205-24, Maintenance and Repair Costs

1. Comment: The respondent agrees that the cost principle can be removed from the FAR.

Councils' response: Concur.

**FAR 31.205-26, Material Costs**

2. *Comment:* One respondent agreed with the deletion of the FAR 31.205-26 wording as proposed because generally accepted accounting principles (GAAP) adequately cover the topic. A second respondent was concerned with the deletions in paragraphs (a) and (c) that deal with the allowability of material costs and the allowability of reasonable adjustments between book and physical inventory. The second respondent was concerned that the part of the FAR that delineates allowable versus unallowable cost would omit these statements of material cost allowability; the respondent believes these statements should be retained to avoid confusion and disputes.

*Councils' response:* Partially concur. The Councils generally believe that affirmative statements of allowability are not value-added in a cost principle. For this reason, the Councils do not believe it is necessary to retain the last sentence in paragraph (a), which simply states that material costs are allowable subject to the requirements of paragraphs (b) through (e) of the cost principle. The Councils recognize that there are instances in which it is desirable to retain the coverage if users might apply another cost principle and improperly disallow a particular type of cost. However, the Councils do not believe this situation exists for FAR 31.205-26.

The current paragraph (c) requires that adjustments for differences in physical and book inventories relate to the period of contract performance. The Councils had recommended deleting this provision and, thereby, relying upon GAAP. However, based on the public input, it appears there are significant concerns that reliance solely upon GAAP could result in potential disputes. The Councils, therefore, now believe that the language in paragraph (c) should be retained. The Councils recognize that this provision provides protection to both the contractor and the Government by specifically permitting reasonable adjustments for inventory differences while also requiring that such adjustments relate to the period of contract performance.

3. *Comment:* A respondent noted that reference to FAR 31.205-26(e) in paragraph (k) of FAR 31.205-11, Depreciation, and in FAR 15.208, Submission, modification, revision, and withdrawal of proposals, needs to be revised to reflect the reordering and renumbering of the FAR 31.205-26 cost principle.

*Councils' response:* Since the Councils have reinstated paragraph (c),

as noted in the response to Comment 1, above, the original paragraph numbering for paragraph (e) is retained and there is no need to revise FAR 31.205-11 or FAR 15.208. Notwithstanding, the Councils note that paragraph (k) of FAR 31.205-11 was deleted by FAC 2001-18, dated December 11, 2003.

**C. Regulatory Planning and Review**

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**D. Regulatory Flexibility Act**

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principles and procedures discussed in this rule. For fiscal year 2003, only 2.4 percent of all contract actions were cost contracts awarded to small businesses.

**E. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

**List of Subjects in 48 CFR Part 31**

Government procurement.

Dated: June 10, 2004.

Ralph J. De Stefano,  
Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 31 as set forth below:

**PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES**

■ 1. The authority citation for 48 CFR part 31 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. In section 31.205-7, revise the last sentence in paragraph (c)(2) to read as follows:

**31.205-7 Contingencies.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \* (See, for example, 31.205-6(g) and 31.205-19.)

**31.205-24 [Removed and Reserved]**

■ 3. Remove and reserve section 31.205-24.

■ 4. Revise section 31.205-26 to read as follows:

**31.205-26 Material costs.**

(a) Material costs include the costs of such items as raw materials, parts, subassemblies, components, and manufacturing supplies, whether purchased or manufactured by the contractor, and may include such collateral items as inbound transportation and in-transit insurance. In computing material costs, the contractor shall consider reasonable overruns, spoilage, or defective work (unless otherwise provided in any contract provision relating to inspecting and correcting defective work).

(b) The contractor shall—

(1) Adjust the costs of material for income and other credits, including available trade discounts, refunds, rebates, allowances, and cash discounts, and credits for scrap, salvage, and material returned to vendors; and

(2) Credit such income and other credits either directly to the cost of the material or allocate such income and other credits as a credit to indirect costs. When the contractor can demonstrate that failure to take cash discounts was reasonable, the contractor does not need to credit lost discounts.

(c) Reasonable adjustments arising from differences between periodic physical inventories and book inventories may be included in arriving at costs; provided such adjustments relate to the period of contract performance.

(d) When materials are purchased specifically for and are identifiable solely with performance under a contract, the actual purchase cost of those materials should be charged to the contract. If material is issued from stores, any generally recognized method of pricing such material is acceptable if that method is consistently applied and the results are equitable.

(e) Allowance for all materials, supplies and services that are sold or transferred between any divisions, subdivisions, subsidiaries, or affiliates of the contractor under a common control shall be on the basis of cost incurred in accordance with this subpart. However, allowance may be at price when—

(1) It is the established practice of the transferring organization to price interorganizational transfers at other

than cost for commercial work of the contractor or any division, subsidiary or affiliate of the contractor under a common control; and

(2) The item being transferred qualifies for an exception under 15.403-1(b) and the contracting officer has not determined the price to be unreasonable.

(f) When a commercial item under paragraph (e) of this subsection is transferred at a price based on a catalog or market price, the contractor—

(1) Should adjust the price to reflect the quantities being acquired; and

(2) May adjust the price to reflect the actual cost of any modifications necessary because of contract requirements.

#### 31.205-44 [Amended]

■ 5. Amend section 31.205-44 in paragraph (f) by removing “31.205-24,”

[FR Doc. 04-13626 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 8, 11 and 53

[FAC 2001-24; Item X]

#### Federal Acquisition Regulation; Technical Amendment

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** This document makes amendments to the Federal Acquisition Regulation (FAR) in order to update an address and remove the illustrations of Standard Forms 254 and 255 (which became obsolete on June 8, 2004) from the FAR.

**DATES:** *Effective Date:* June 18, 2004.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. Please cite FAC 2001-24, Technical Amendments.

#### List of Subjects in 48 CFR Parts 8, 11 and 53

Government procurement.

Dated: June 10, 2004.

Ralph J. De Stefano,  
*Acting Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 8, 11 and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 8, 11 and 53 is revised to read as follows:

#### PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

#### 8.003 [Amended]

■ 2. Amend section 8.003 in paragraph (d) by removing from the address “Suite 4528” and adding “Suite 3229” in its place.

#### PART 11—DESCRIBING AGENCY NEEDS

#### 11.102 [Amended]

■ 3. Amend section 11.102 by removing “DoD 4120.3-M” each time it appears and adding “DoD 4120.24-M” in its place.

#### 11.202 [Amended]

■ 4. Amend section 11.202 in paragraph (b) by removing “DoD 4120.3-M” and adding “DoD 4120.24-M” in its place.

#### PART 53—FORMS

#### 53.301-254 and 53.301-255 [Removed]

■ 5. Remove sections 53.301-254 and 53.301-255.

[FR Doc. 04-13627 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Chapter 1

#### Federal Acquisition Regulation; Small Entity Compliance Guide

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2001-24 which amend the FAR. An asterisk (\*) next to a rule indicates that a regulatory flexibility analysis has been prepared.

Interested parties may obtain further information regarding these rules by referring to FAC 2001-24 which precedes this document. These documents are also available via the Internet at <http://www.acqnet.gov/far>.

**FOR FURTHER INFORMATION CONTACT:** Laurie Duarte, FAR Secretariat, (202) 501-4225. For clarification of content, contact the analyst whose name appears in the table below.

#### LIST OF RULES IN FAC 2001-24

Item	Subject	FAR Case	Analyst
*I .....	Incentives for Use of Performance-Based Contracting for Services (Interim) .....	2004-004	Wise.
II .....	Definitions Clause .....	2002-013	Parnell.
III .....	Procurement Lists .....	2003-013	Nelson.
IV .....	Determining Official for Employment Provision Compliance—Immigration and Nationality Act (INA) .....	2004-009	Goral.
*V .....	Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs) ..	1999-603	Nelson.
VI .....	Designated Countries—New European Communities Member States .....	2004-008	Davis.
VII .....	Buy American Act—Nonavailable Articles .....	2003-007	Davis.
VIII .....	Application of Cost Principles and Procedures and Accounting for Unallowable Costs .....	2002-006	Loeb.
IX .....	Gains and Losses, Maintenance and Repair Costs, and Material Costs .....	2002-008	Loeb.

## LIST OF RULES IN FAC 2001-24—Continued

Item	Subject	FAR Case	Analyst
X .....	Technical Amendments.		

**Item I—Incentives for Use of Performance-Based Contracting for Services (Interim) (FAR Case 2004-004)**

This interim rule amends the FAR to implement Sections 1431 and 1433 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136). Section 1431 enacts Governmentwide authority to treat performance-based contracts or task orders for services as commercial items if certain conditions are met, and requires agencies to report on performance-based contracts or task orders awarded using this authority. Section 1433 amends the definition of commercial item to add specific performance-based terminology and to conform to the language added by section 1431. Contracting officers will be able to use FAR Part 12, Acquisition of Commercial Items, and Subpart 37.6, Performance-Based Contracting, for non-commercial services and treat these services as commercial services when specific conditions are met. Agencies will be required to report on performance-based contracts or task orders awarded using this authority.

**Item II—Definitions Clause (FAR Case 2002-013)**

FAR 2.201 and the clause at 52.202-1 are revised to clarify the applicability of FAR definitions to solicitation provisions and contract clauses. The list of definitions in 52.202-1 is removed and replaced with policy stating that, when a solicitation provision or contract clause uses a word or term that is defined in the FAR, the word or term has the meaning given in FAR 2.101 at the time the solicitation was issued. Certain exceptions to this policy are listed in FAR 52.202-1.

**Item III—Procurement Lists (FAR Case 2003-013)**

This final rule amends the FAR to clarify that the Javits-Wagner O'Day (JWOD) program becomes a mandatory source of supplies and services when the supplies or services have been added to the Procurement List maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled.

**Item IV—Determining Official for Employment Provision Compliance--Immigration and Nationality Act (INA) (FAR Case 2004-009)**

This final rule amends FAR 9.406-2(b)(2) by revising the responsibility for determining when a contractor is not in compliance with the Immigration and Nationality Act (INA), to include both the Attorney General of the United States and the Secretary of Homeland Security.

This rule implements Executive Order 13286 published March 5, 2003, which amended Section 4 of Executive Order 12989 published February 15, 1996.

Debarring officials may now debar a contractor based on a determination by the Secretary of Homeland Security or the Attorney General of the United States.

**Item V—Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs) (FAR Case 1999-603)**

This final rule amends the FAR in order to incorporate policies and procedures for services under Federal Supply Schedules. The rule—

- Adds a definitions section;
- Adds information regarding the Department of Veterans Affairs delegated authority to establish medical supply schedules;
- Adds language to clarify the differences between an Authorized Federal Supply Schedules (FSS) Pricelist and a FSS publication;
- Adds additional information regarding e-buy, GSA's electronic quote system for the schedules program;
- Clarifies that competition shall not be sought outside the Federal Supply Schedules;
- Adds language to make it clear that the contracting officer placing an order on another agency's behalf is responsible for applying that agency's regulatory and statutory requirements; and that the requiring activity is required to provide information on the applicable regulatory and statutory requirements to the contracting officer;
- Adds new coverage on use of statements of work when acquiring services from the schedules;
- Requires that when an agency awards a task order requiring a statement of work, that if the award is based on other than price (best value),

the contracting officer shall provide a brief explanation of the basis for the award decision to any unsuccessful contractor that requests such information.

- Adds language stating that the performance period of Blanket Purchase Agreement (BPA) established under the schedules program may cross option periods on the base contracts;
- Refines guidance regarding the use of Governmentwide BPAs;
- Adds language to require the ordering activity to document the results of its BPA review;
- Adds language that encourages or reminds agencies that they can seek a price reduction at any time, not just when an order exceeds the maximum order threshold;
- Adds additional language to allow for consideration of socio-economic status when identifying the potential competitors for an order;
- Reinforces documentation requirements generally and adds new guidance addressing the documentation of orders for services and sole source orders;
- Adds new coverage to allow agencies to make payment for oral or written orders by any authorized means, including the Governmentwide commercial purchase card;
- Reserves the ordering procedures for Mandatory Use Schedules section;
- Clarifies the procedures for termination for cause and convenience; and
- Reorganizes and revises the subpart text for ease of use.

**Item VI—Designated Countries New European Communities Member States (FAR Case 2004-008)**

This final rule amends the FAR to implement a determination by the United States Trade Representative (USTR) under the Trade Agreements Act that suppliers from the 10 new member states of the European Communities (EC) (i.e., the European Union) are eligible to participate in U.S. Government procurement under the terms and conditions of the World Trade Organization Government Procurement Agreement (WTO GPA). This means that in acquisitions subject to the WTO GPA, the contracting officer can accept offers of eligible products from Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania,

Malta, Poland, the Slovak Republic, and Slovenia without application of the Buy American Act evaluation factor.

**Item VII—Buy American Act—Nonavailable Articles (FAR Case 2003-007)**

This final rule amends Federal Acquisition Regulation (FAR) 25.104(a) to add certain food and textile items to the list of articles not available from domestic sources in sufficient and reasonably available commercial quantities of a satisfactory quality. This case is based on extensive market research by the Defense Logistics Agency. Unless the contracting officer learns before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available quantities of a satisfactory quality, the Buy American Act does not apply to acquisition of these items as end products, and the contracting officer may treat foreign components of the same class or kind as domestic components.

**Item VIII—Application of Cost Principles and Procedures and Accounting for Unallowable Costs (FAR Case 2002-006)**

This final rule amends the Federal Acquisition Regulation (FAR) by revising FAR 31.204, Application of principles and procedures, to improve clarity and structure. The case was initiated as a result of comments and recommendations received from industry and Government representatives during a series of public meetings. This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, e.g., price revision of fixed-price incentive contracts, terminated contracts, or indirect cost rates.

**Item IX—Gains and Losses, Maintenance and Repair Costs, and Material Costs (FAR Case 2002-008)**

This final rule amends the FAR by deleting the cost principle at FAR 31.205 24, Maintenance and repair costs, because either Cost Accounting Standards (CAS) or Generally Accepted Accounting Practices (GAAP)

adequately address these costs. The rule also revises the cost principles at FAR 31.205-7, Contingencies; FAR 31.205-26, Material costs; and FAR 31.205-44, Training and education costs, by improving clarity and structure, and removing unnecessary and duplicative language.

The case was initiated as a result of comments and recommendations received from industry and Government representatives during a series of public meetings. This rule is of particular interest to contractors and contracting officers who use cost analysis to price contracts and modifications, and who determine or negotiate reasonable costs in accordance with a clause of a contract, e.g., price revision of fixed-price incentive contracts, terminated contracts, or indirect cost rates.

**Item X—Technical Amendments**

This amendment makes editorial changes at 8.003(d), 11.102, and 11.202(b), and removes sections 53.301-254 and 53.301-255.

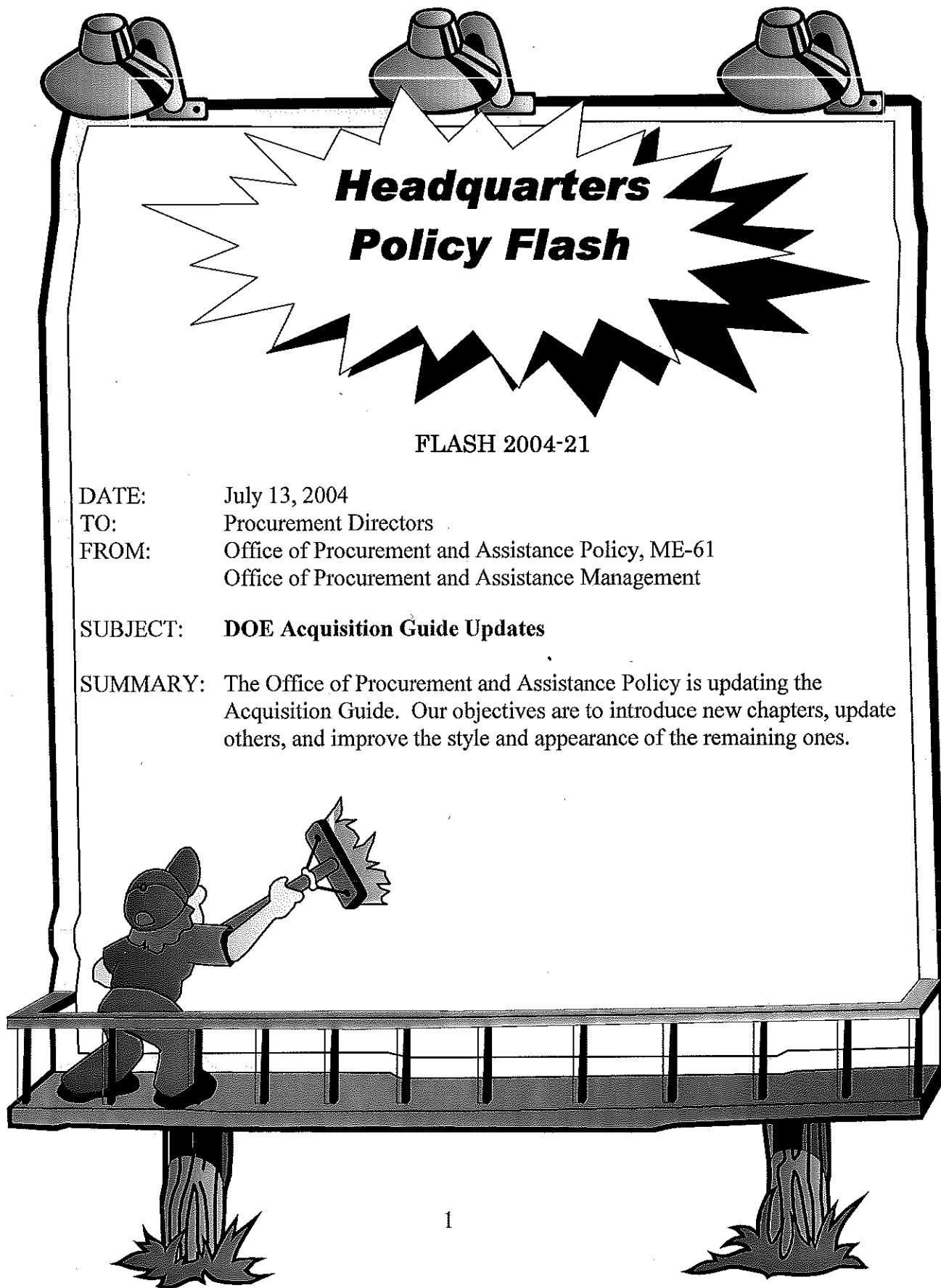
Dated: June 10, 2004.

**Ralph J. De Stefano,**

*Acting Director, Acquisition Policy Division.*

[FR Doc. 04-13628 Filed 6-17-04; 8:45 am]

BILLING CODE 6820-EP-P



## **Headquarters Policy Flash**

FLASH 2004-21

DATE: July 13, 2004  
TO: Procurement Directors  
FROM: Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

SUBJECT: **DOE Acquisition Guide Updates**

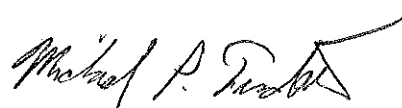
SUMMARY: The Office of Procurement and Assistance Policy is updating the Acquisition Guide. Our objectives are to introduce new chapters, update others, and improve the style and appearance of the remaining ones.

This Flash transmits the second installment under this project. Additional installments will follow as they are completed.

There are two significant chapter revisions in this installment: 6.1, Competition; and 35.1, Scientific and Technical Information. There are also five primarily editorial chapter revisions in this installment, though the revisions include some updated materials as well: 17.2, Cost Participation; 17.4 Program Opportunity Notices; 17.5 Program Research and Development Notices; 22.1, Labor Standards for Construction; and 47.1, Transportation – Air Charter. Finally, three chapters have been removed. Chapter 45, Government Property, was removed because the coverage was obsolete. Chapter 70.1, Cost Participation, was removed because it was duplicative of 17.2 and inappropriate in Chapter 70. Chapter 70.2, Entertainment, Fines, and Recreation Costs, was removed because its coverage has been incorporated in FAR.

Copies of the revised chapters are not attached but have been posted to the Home Page.

A listing of the revised and removed chapters is attached.

A handwritten signature in black ink, appearing to read "Michael P. Fischetti", with a stylized flourish at the end.

Michael P. Fischetti  
Acting Director  
Office of Procurement and  
Assistance Policy

Attachment



**Department of Energy Acquisition Guide  
2004 Updates Installment 2**

<b>Chapter</b>	<b>Title</b>	<b>Author</b>	<b>Nature of Change</b>
New Chapters			
None			
Significantly Revised Chapters			
6.1	Competition	ME-62, B. Schreiber	Updated
35.1	Scientific and Technical Information	OSTI, S. Jordan R. Langston	Updated
Primarily Editorially Revised Chapters			
17.2	Cost Participation	ME-61, T. Sheppard	Editorial Revisions
17.4	Program Opportunity Notices	NETL J. Augustine	Editorial Revisions
17.5	Program Research and Development Notices	NETL J. Augustine	Editorial Revisions
22.1	Labor Standards for Construction	LM-2, D. Sullivan ME-61, R. Langston	Editorial Revisions
45.1	Government Property	ME-63, J. Carpenter	Removed and Reserved
47.1	Transportation – Air Charter	ME-64 P. Fuller R. Langston	Editorial Revisions
70.1	Cost Participation		Removed
70.2	Entertainment, Gifts, And Recreation		Removed



# **HEADQUARTERS POLICY FLASH**

## **POLICY FLASH 2004-22**

DATE: August 04, 2004  
TO: Procurement Directors  
FROM: Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

SUBJECT: Financial Assistance Letter Number 2004-05, Selecting the Appropriate Award Instrument.

SUMMARY: This Policy Flash distributes Financial Assistance Letter No. 2004-05, Selecting the Appropriate Award Instrument and cancels FAL 2001-03 on the same topic.

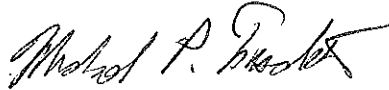
# **POLICY FLASH**

## **2004-22**

This FAL provides similar guidance to that provided in FAL 2001-03. In addition, the FAL provides examples of substantial involvement and no substantial involvement in assistance awards and explains when a Contracting Officer may select a procurement contract even though the principal purpose of the award is to accomplish a public purpose of support or stimulation.

The guidance has been drafted as a Financial Assistance Guide Chapter. The FAL will remain in effect until the new Financial Assistance Guide is issued.

Questions concerning this Flash should be directed to Trudy Wood at (202) 287-1336.



Michael P. Fischetti, Acting Director  
Office of Procurement and  
Assistance Policy

Attachment

cc:  
FAAC



**Department of Energy  
Financial Assistance Regulation**

**No. 2004-05  
Date 08/03/04**

# **FINANCIAL ASSISTANCE LETTER**

Financial Assistance Letter is issued under the authority of the Procurement Executives of DOE and NNSA

## **Subject: SELECTING THE APPROPRIATE AWARD INSTRUMENT**

### **What is the purpose of this Financial Assistance Letter (FAL)?**

This FAL provides Contracting Officers and other grants personnel guidance on selecting the appropriate award instrument.

### **How will this change my work processes?**

This FAL does not change any of your work processes. It merely provides additional guidance on selecting the appropriate award instrument.

### **When is this FAL effective?**

This FAL is effective 10 days after the date of issuance. It supercedes and cancels FAL 2001-03, dated 10/12/2001.

### **When does this FAL expire?**

This FAL remains in effect until the new Financial Assistance Guide is issued or until it is canceled.

### **Who is the Point of Contact?**

Contact Trudy Wood of the Office of Procurement and Assistance Policy by telephone at (202) 287-1336 or by email at [trudy.wood@hq.doe.gov](mailto:trudy.wood@hq.doe.gov).

### **What is the background?**

Congress enacted the Federal Grant and Cooperative Agreement Act of 1977 to, among other things, distinguish Federal procurement relationships from Federal assistance relationships and to standardize usage and clarify the meaning of the terms “contract,” “grant,” and “cooperative agreement” and the relationships they reflect. The purpose of this guidance is to achieve consistency in the use of legal instruments by DOE awarding activities for procurement and assistance transactions. This guidance supplements the guidance in the statute and the DOE financial assistance regulations. In addition to the guidance provided in FAL 2001-03, this FAL provides examples of substantial involvement and no substantial involvement in assistance awards and explains when a Contracting Officer may select a procurement contract even though the principal purpose of the award is to accomplish a public purpose of support or stimulation.

This guidance has been drafted as a Financial Assistance Guide Chapter and will be included in the new Financial Assistance Guide when it is issued.

## **Guidance Included in this Financial Assistance Letter**

.....

### **GUIDE CHAPTER 2**

**2.11 Selecting Appropriate Award Instrument: Procurement Contract or Financial Assistance Agreement**

**2.12 Selecting Type of Financial Assistance: Grant or Cooperative Agreement**

\*\*\*\*\*

**GUIDE CHAPTER 2**  
**Sections 2.11 and 2.12**

**2.11 Selecting Appropriate Award Instrument: Procurement Contract or Financial Assistance Agreement**

- (a) Responsibility: The Contracting Officer, based on input from the program official pertaining to the purpose of the award, is responsible for selecting the appropriate award instrument. This decision is significant because the laws and policies governing procurement generally differ from those governing financial assistance.
- (b) Basis of Decision. In accordance with the Federal Grant and Cooperative Agreement Act (FGCA) as codified in 31 U.S.C. §§ 6301 to 6308, the decision whether to use a contract or a financial assistance agreement must be based on the principal purpose of the award, including its intended primary beneficiary. The type of recipient (e.g., university, non-profit, or for-profit organization) or a requirement for cost sharing are not factors in determining the appropriate award instrument.
  - 1. Contract. The Contracting Officer should use a procurement contract when: (1) the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; or (2) he/she decides in a specific instance that the use of a type of procurement contract is appropriate. If DOE/NNSA provides specifications for the project, is having the project completed based on its own identified needs, or will directly use the report or results of the project to support its mission objectives, then, in most cases, the principal purpose is to acquire property or services for the direct benefit or use of DOE/NNSA and the award instrument should be a contract.

31 U.S.C. § 6303 provides agencies the flexibility to select a procurement contract after a deliberate determination that it is more appropriate, even if the purpose of the award is to accomplish a public purpose of support or stimulation. For example, a Contracting Officer should select a procurement contract if the work is classified, even if the work serves a public purpose of support, to ensure that the appropriate FAR/DEAR security clauses are included in the award since the DOE financial assistance regulation does not include security requirements. Also, a Contracting Officer should select a procurement contract if the award has the characteristics of a contractual relationship and includes contract requirements such as: (1) technical direction, except when such direction is necessary to redirect the work because of the interrelationship of the project to other projects (See 2.12(f)(3)); (2) monthly reporting requirements, except when special award conditions are needed for high risk recipients; and (3) fee, except for SBIR/STTR awards or in accordance with 10 CFR 605.15.

2. Financial Assistance Instrument (i.e., grant or cooperative agreement). The Contracting Officer should use a grant or cooperative agreement whenever the principal purpose of the relationship is the transfer of a thing of value to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring property or services for the direct benefit or use of the United States Government. The primary beneficiary under a grant or cooperative agreement is the general public, as opposed to the United States Government. However, there may be situations where the Department expects to derive some use or benefit from the project activities. If the project will produce a benefit or use to DOE/NNSA that is only indirect or incidental in nature, a grant or cooperative agreement may be used.
3. Decision Process. To ensure that the appropriate instrument is selected, the Contracting Officer should ask the following questions:
  - A. Is the primary purpose of the award to acquire goods or services that will directly benefit or be used by the Department to further a specific DOE/NNSA mission or requirement? If the answer to this question is "yes," then the award instrument should be a contract. If the answer is "no," then the Contracting Officer should use a grant or cooperative agreement.
  - B. Is the work to be performed by the recipient primarily for its own purposes in the furtherance of the public good, and DOE/NNSA is merely supporting this effort with financial or other assistance? If the answer to this question is "yes," then the award instrument should be a grant or cooperative agreement. If the answer is "no," then the award instrument should be a contract.
- (c) Statutory Language Affect on Instrument Selection. A statute authorizing or providing appropriations for a program or activity occasionally may specify the use of a particular award instrument, notwithstanding the fact that, under the guidance provided in the 31 U.S.C. Chapter 63, the purpose of the award would necessitate the use of a different type of instrument. In these situations, the Contracting Officer must attempt to harmonize the language of the two statutes. Unless the authorization or appropriation act provides that a particular award instrument will be used notwithstanding the provisions of the 31 U.S.C. Chapter 63, the principles articulated in that statute and this guide generally should be applied to determine the appropriate award instrument. When confronted with conflicting statutory language, the Contracting Officer should consult with legal counsel to determine the appropriate course of action.
- (d) Examples of Ambiguous Circumstances.
  1. Conferences. The appropriate instrument for funding conferences should be determined based on the statutory criteria (i.e., the principal purpose of the conference, including the intended primary beneficiary). For example, a conference whose primary purpose is to exchange and disseminate information to the public should be funded using a grant. While the awarding office may benefit from information exchanged at the conference, the principal

intent of the award is to stimulate dissemination of knowledge to benefit the public. If, however, a conference is being conducted to benefit a Federal agency, funding should be provided under a contract. For example, a conference to provide specialized training to grantees that would otherwise be provided by Federal agency personnel should be funded by a contract. In this example although the recipients of the training benefit from the conference, the principal purpose of the award is for the government to procure training services in lieu of conducting its own training program, thus meeting the FGCA contract standard of directly benefiting the Federal agency.

2. Evaluations or studies. Evaluations or studies are other activities that, depending on the circumstances, can be appropriately awarded as either a financial assistance instrument or a contract. For example, a study to assess the benefits of solar energy for State and local communities should be funded using a grant if the primary beneficiaries are the State and local communities. However, if the study is being conducted to assist DOE in planning and forecasting its solar energy budget requirements or to prepare a mandated report for Congress, then a contract should be used. While the Federal Government might benefit from the information obtained from the study in the first scenario, the primary beneficiaries are the State and local communities. In the second scenario, the study is for the direct use of DOE, even though it may be disseminated to the general public and may be used by other organizations and governments in their own solar energy efforts.

## 2.12 Selecting Type of Financial Assistance: Grant or Cooperative Agreement

- (a) Responsibility: The Contracting Officer, based on input from the program official on the extent of Federal involvement in the project, is responsible for selecting the appropriate financial assistance instrument.
- (b) Differences. The primary distinguishing feature between a grant and cooperative agreement is that under a cooperative agreement substantial involvement is anticipated between the DOE/NNSA program office and the recipient during performance of the funded activity. As a general rule, a cooperative agreement has the same characteristics as a grant; however, cooperative agreements also involve the following features that are not typical of a grant:
  1. Substantial Federal involvement in and contribution to the technical aspects of the effort are necessary for its accomplishment. This involvement may include collaboration, participation in the management of the project, or intervention in the activity and is over and above the exercise of federal stewardship responsibilities (See paragraph 2.12 (e).
  2. The nature of the collaboration is clearly defined and specified in a special award condition entitled "Statement of Substantial Involvement."
- (c) OMB Policy on Substantial Involvement. Agencies should limit Federal involvement in cooperative agreement activities to the minimum consistent with program requirements.



- (d) Decision Process. Anticipated substantial Federal involvement is a relative rather than an absolute concept. The determination to use a cooperative agreement, as opposed to a grant, should be based primarily on "programmatic" considerations as differentiated from management considerations. A cooperative agreement should not be used solely as a means of exercising greater control over a recipient or the project than would be the case under a grant. The proposed Federal involvement must provide programmatic benefits that the recipient would not otherwise have available to it in carrying out the project. The general policy is:
1. Substantial involvement is not anticipated if the recipient is expected to run the project without agency collaboration, participation, or intervention as long as it is run in accordance with the terms of the assistance instrument.
  2. Substantial involvement is anticipated if the project would not be possible without Federal collaboration or participation in the management of the project.
- (e) No Substantial Involvement. Substantial involvement does not include the exercise of normal Federal stewardship responsibilities such as:
1. Approving recipient plans prior to award.
  2. Providing technical assistance prior to the start of the activity and the recipient understood this prior to award, and/or if requested by the recipient.
  3. Providing technical assistance to correct deficiencies in project or financial performance when reports or monitoring indicates some sort of problem.
  4. Performing site visits.
  5. Reviewing financial, performance, and audit reports.
  6. Performing technical reviews to determine whether to continue funding the next budget period.
  7. Reviewing performance to ensure that the objectives, terms, and conditions of the award are accomplished.
  8. Providing general administrative requirements, such as prior approvals required by the financial assistance regulations and/or OMB Circulars.
  9. Reviewing performance after completion.
- (f) Substantial Involvement. Federal involvement would exist and, depending on the circumstances, could be substantial, if such involvement includes, for example:

1. Review and approval of one stage before work can begin on a subsequent stage. Such review and approval is in addition to the exercise of the normal Federal stewardship responsibility to determine whether to continue funding the next budget period, which does not constitute substantial involvement. (See 2.12(e) for examples of no substantial involvement.)
  2. Collaboration or joint participation in the project, for example, sharing facilities and personnel or if a jointly authored report or education curriculum product is anticipated.
  3. Additional monitoring to permit specified kinds of direction or redirection of the work because of interrelationships with other projects.
  4. Substantial direct operational involvement or participation is anticipated to ensure compliance with statutory requirements such as environmental protection. Such participation must be over and above the normal exercise of Federal stewardship responsibilities. (See paragraph 2.12(e) for examples of no substantial involvement.)
  5. The power to immediately halt an activity if detailed performance specifications (e.g., construction specifications) are not met. In this case, the "Substantial Involvement Statement" must include provisions that go beyond the normal suspension remedies available to the Federal Government for nonperformance.
- (g) Award Provision – Statement of Substantial Involvement. The program official must prepare a "Statement of Substantial Involvement" for each cooperative agreement, which explicitly describes the nature, character, and extent of anticipated Federal involvement. Merely stating that "DOE will be substantially involved in the project" is not sufficient. These statements must be developed with care, such as ensuring that the Government's responsibilities are described with sufficient specificity, to avoid unnecessarily increasing the Department's liability under the award. The Contracting Officer is responsible for ensuring that the involvement is substantial (i.e., over and above the normal stewardship responsibilities identified in paragraph (e)), and that the award provision clearly describes the nature and extent of the anticipated involvement.
- (h) Program Announcement. If the Contracting Officer determines that only cooperative agreements will be awarded under a specific program announcement, the announcement must include a Statement of Substantial Involvement as a proposed award term. If the Contracting Officer determines that either a grant or a cooperative agreement may be awarded under the program announcement, the announcement must specify that either grants or cooperative agreements may be awarded and that cooperative agreements will include a Statement of Substantial Involvement to be determined prior to award.

**OFFICE OF PROCUREMENT AND ASSISTANCE POLICY  
CY 2004 INDEX OF POLICY FLASHES**

2004-19	Central Contractor Registration (CCR) and Awards	6/17/04	J. Kniskern
2004-20	Federal Acquisition Circulars (FAC) 2001-24, Final and Interim Rules Amending the FAR	7/12/04	D. Wright
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2004-22	Financial Assistance Letter Number 2004-05, Selecting the Appropriate Award Instrument	8/4/04	T. Wood
2004-23	<ol style="list-style-type: none"> <li>1. Proper Use of Other Agencies' Contracts</li> <li>2. Environmentally Preferable Purchasing</li> <li>3. On-line Training Available for Central Contractor Registration (CCR)</li> </ol>	8/10/04	Kniskern/.Lang
2004-24	Department of Energy (DOE) Acquisition Guide Chapter Revisions	9/2/04	R. Lang

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# **HEADQUARTERS POLICY FLASH**

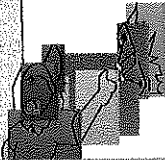
## **POLICY FLASH 2004-23**

**DATE:** August 10, 2004  
**TO:** Procurement Directors  
**FROM:** Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

**SUBJECT:**

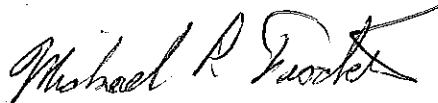
- 1. Proper Use of Other Agencies' Contracts**
- 2. Environmentally Preferable Purchasing**
- 3. On-line Training Available for Central Contractor Registration (CCR)**

**SUMMARY:** This Policy Flash forwards two memoranda just issued by the Procurement Executive. The first discusses the proper use of other agencies' contracting vehicles and the second encourages use of environmentally preferable procurement of "bio-based" products. The third paragraph provides information on training opportunities for CCR.



- 1) This memorandum provides reminders on the proper use of non-DOE contracting vehicles, including Economy Act transactions, Government-wide Acquisition Contracts, and Federal Supply Schedules. The recent discovery of improper use of such contracting vehicles has led to investigations of procurement activities at the General Services Administration and Department of Defense. Contracting Officers are cautioned to be diligent in the use of other agencies' contracting vehicles.
- 2) This memorandum provides an overview of a Biobased Products Procurement Preference Program being developed as a result of the Farm Security and Rural Development Act of 2002 and a recent rulemaking issued by the U.S. Department of Agriculture. It will highlight the DOE Office of Energy Efficiency and Renewable Energy's encouragement to DOE offices and management contractors to be early adopters of the program. The letter includes a list of proposed biobased products and an Environmentally Preferable Procurement Forecast Opportunities tool which identifies procurements featuring environmentally preferable products and services. Please share with your management contract procurement managers.
- 3) Previously, several Policy Flashes have been released to provide information and guidance on new requirements for CCR. These Policy Flashes, 2003-05, 2003-12, 2003-27, and 2004-19 provided guidance on registration for ongoing contracts, registration requirements for payments, and incorporation of this requirement in solicitations.

To aid contracting personnel, the Federal Acquisition Institute's (FAI) Online University is offering free training on the CCR. This course is highly recommended for all contracting personnel, can be completed in approximately one hour, and provides one credit towards the continuous learning requirement. The FAI Online University can be accessed at [www.faionline.com](http://www.faionline.com). If you have any questions on this subject, please contact Ms. Jacqueline Kniskern of my staff at (202) 287-1342.



Michael P. Fischetti  
Acting Director  
Office of Procurement and  
Assistance Policy, OMBE

#### Attachments

cc:  
PPAG Members  
Sandra Cannon  
Mark E. Decot  
Donald Lentzen





## Department of Energy

Washington, DC 20585

AUG 06 2004

### MEMORANDUM FOR DISTRIBUTION

FROM: RICHARD H. HOPF, DIRECTOR  
OFFICE OF PROCUREMENT  
AND ASSISTANCE MANAGEMENT

SUBJECT: Proper Use of Other Agencies' Contracts

The proper use of acquisition vehicles placed by other agencies, but available for use by DOE as an ordering agency, is a current issue in contract oversight. We have all read of recent events concerning the discovery of improper procurement practices by the General Services Administration's (GSA) Contracting Officers, questions concerning the propriety of orders placed by the Department of Defense against GSA acquisition vehicles, and the 10-day suspension of GSA's designation as an executive agent for Government-wide acquisition contracts (GWACs). These occurrences illuminate the need for DOE's contracting professionals to practice due diligence in using other agencies' contracts.

Therefore, you are reminded of the following:

#### ECONOMY ACT

Compliance with the Economy Act (31 U.S.C. 1535) is mandatory. Guidance applying to interagency acquisitions is found at Federal Acquisition Regulation (FAR) Subpart 17.5. The Economy Act applies when more specific statutory authority does not. It does not, for example, apply to acquisitions from required or optional sources of supplies prescribed in FAR Part 8, which have their own separate statutory authority. Nor does it apply to acquisitions using GWACs.

While the Economy Act authorizes agencies to obtain supplies or services by interagency acquisition, it may not be used to circumvent: (1) Federal or DOE regulations, for example, to avoid competition requirements; (2) limitations on the use of funds; (3) requirements of FAR Subpart 7.3, Contractor Versus Government Performance; or (4) any other agency's authority or responsibility.

When using the Economy Act, pay particular attention to compliance with all aspects of FAR, Department of Energy Acquisition Regulation (DEAR), applicable statutes, regulations, policies, and agency specific requirements -- regardless of whether DOE is the requiring or servicing agency.



## GWAC

A GWAC is a multiple award contract issued by one agency that may be used by other agencies to procure *information technology* products and services. The Office of Management and Budget (OMB) has designated four agencies as executive agents for GWACs: GSA, National Institutes of Health, National Aeronautics and Space Administration, and Department of Commerce.

GWACs are valuable tools for the acquisition of information technology supplies and services, but diligence is required to ensure that orders placed: (1) comply with all applicable DOE regulations, policies, and procedures; (2) fall within the scope of the master GWAC contract; and (3) conform to any other Federal regulation or unique requirement associated with the acquisition. When using GWACS, pay particular attention to compliance with the specific requirements of the awarding agency, to include those for competitive tasking, consistency with the scope of work, and use for a specific purpose.

## FSS

GSA has the authority to enter into other acquisition vehicles for Government-wide use. The Federal Supply Schedules (FSS) are one example. Contracting officers must comply with the procedures in FAR Part 8 when using FSS. They may only place orders against the FSS for supplies or services listed on a vendor's schedule contract. Contracting Officers must comply with the specific requirements of the awarding agency, including those for competitive tasking, consistency with the scope of work, and use of the vehicles for a specific, not overly broad or undefined, purpose.

## FRANCHISES

When obtaining acquisition assistance from "Franchise" procurement organizations (e.g., GovWorks), the assistance may not be used to circumvent DOE acquisition policies or procedures. The franchise organization should be coordinating with, and work at the direction of, the local DOE contracting office.

The DOE Acquisition Guide is currently being updated with additional information on GWACs, FSS, and Economy Act transactions. Training programs for DOE contracting officers and contracting officer's representatives are being reviewed to determine the adequacy of existing training. Existing procedures and policies on the use of these vehicles are under review. Additional safeguards may be forthcoming. In the meantime, we can ensure that non-DOE acquisition vehicles are properly used by adhering to the rules and principles outlined above.

If you have any questions on this subject, please contact Ms. Jacqueline Kniskern of my staff at (202) 287-1342.



## DISTRIBUTION

Mike Adams, Acting Procurement Director, Idaho Operations Office  
Michael Allison, Procurement Director, Savannah River Operations Office  
Mike Barrett, Acting Procurement Director, Office of River Protection  
John Bashista, Headquarters Procurement Services  
Debra Bean, Procurement Director, Western Area Power Administration  
Ken Berglund, Procurement Director, Bonneville Power Administration  
Stanley Colt, Acting Procurement Director, Carlsbad Area Office  
Charles Crowe, Procurement Director, Oak Ridge Operations Office  
Charlie Dan, Procurement Director, Rocky Flats Field Office  
John Greenwood, Procurement Director, Chicago Operations Office  
Birdie Hamilton-Ray, Procurement Director, Office of Repository Development (RW)  
Gary Landry, Procurement Director, Strategic Petroleum Reserve Project Office  
Anthony Lorenz, Procurement Director, Richland Operations Office  
Joel Seymour, Procurement Director, Southeastern Power Administration  
Dale Siciliano, Procurement Director, National Environmental Technology Laboratory  
Mona Snyder, Procurement Director, Ohio Field Office  
Cris Van Horn, Procurement Director, Southwestern Power Administration  
Jerry Zimmer, Procurement Director, Golden Field Office

### cc:

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Susan J. Grant, Director, ME-1  
James T. Campbell, Deputy Director, ME-2  
Stephen Mournighan, Deputy Director, ME-60  
Edward Simpson, Director, ME-62  
Jan Chavez-Wilcynski, Director, ME-65  
Robert, Braden, Director, NA-63  
James J. Cavanagh, Deputy Director, NA-63



## Department of Energy

Washington, DC 20585

AUG 06 2004

### MEMORANDUM FOR DISTRIBUTION

FROM: RICHARD H. HOPF, DIRECTOR  
OFFICE OF PROCUREMENT  
AND ASSISTANCE MANAGEMENT

SUBJECT: Environmentally Preferable Purchasing

As a result of Section 9002 of the Farm Security and Rural Investment Act of 2002, the United States Department of Agriculture (USDA) published a Notice of Proposed Rulemaking in the Federal Register on December 19, 2003, 68FR70730, entitled "Guidelines for Designating Biobased Products for Federal Procurement". This was the first step in the development of a mandatory purchasing program being referred to as the "Buy Bio Program". The Act, as well as Executive Orders 13101 and 13134, provide for a preferred procurement program for biobased versus similar petroleum based products, and is modeled after EPA's Affirmative Procurement Program for recycled content products. USDA will develop a list of products that Federal agencies and their contractors will be obliged to purchase with biobased content. A FAR Case to implement this new program is under development.

Within DOE, the Office of Energy Efficiency and Renewable Energy (EERE), through its Office of the Biomass Program, is urging the Department and its management contractors to be early adopters of the Buy Bio Program. The nation's energy security is enhanced by substituting domestically produced biobased products in place of those produced from petroleum and makes DOE early adopters of the Act. A synopsis of the requirements within Section 9002 and the draft list of biobased products is attached. Early adoption is voluntary for individual contracting activities and management contractors. But, along with enhancing energy security, early adoption has the advantage of developing familiarity with biobased products that will be mandatory for purchase when the program is ultimately implemented. The attached "Environmentally Preferable Contracting Opportunities List" was prepared by EERE's Biomass Program, based upon an analysis of the procurement forecasts of DOE and its management contractors. The attachment lists opportunities identified to promote DOE's Voluntary Early Adopter Buy Bio Program and other preferred procurement products, such as recycled content products and energy and water efficient products. Many opportunities are service acquisitions, such as construction and janitorial services, for which building materials with biobased, recycled content, and environmentally preferable cleaning supplies may be specified.



You are encouraged to share this memorandum and its attachments with your management contractors, facility management, and other requirements personnel, and to use this tool to expand the award of environmentally preferable contracts and orders. Those interested in learning more about the Buy Bio or Affirmative Procurement Programs should contact their site's Green Acquisition Advocates or Recycling Coordinators who receive recurring updates on both programs through quarterly "Environmentally Preferable Contracting Teleconferences". Please informally keep track of successes in this area, so they can be reported when the annual Resource Recovery and Conservation Act (RCRA) report is prepared. Questions may be addressed to Mr. Richard Langston, of my staff, at (202) 287-1339 [Richard.Langston@hq.doe.gov](mailto:Richard.Langston@hq.doe.gov) .

Attachments

## DISTRIBUTION

Mike Adams, Acting Procurement Director, Idaho Operations Office  
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Douglas E. Kaempf, Program Manager, EE-2E  
Andrew C. Lawrence, Deputy Assistant Secretary, EH-41  
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Jan Chavez-Wilczynski, Director, ME-65  
Robert, Braden, Director, NA-63  
James J. Cavanagh, Deputy Director, NA-63

## **Background Info**

### **U.S. Department of Energy's Buy Bio Early Adopter Initiative**

Synopsis of *Federal Register* Proposed Rule

“Guidelines for Designating Biobased Products for Federal Procurement”

December 19, 2003 – U.S. Department of Agriculture

[http://www.access.gpo.gov/su\\_docs/aces/fr-cont.html](http://www.access.gpo.gov/su_docs/aces/fr-cont.html)

“Within 1 year after the publication date of each designated item, Federal agencies that have the responsibility for drafting or reviewing specifications for items procured by Federal agencies shall ensure that their specifications require the use of designated items composed of biobased products, consistent with these guidelines.”

“Within 1 year after the publication date of these guidelines, each Federal agency shall develop a procurement program which will assure that items composed of biobased products will be purchased to the maximum extent practicable and which is consistent with applicable provisions of Federal procurement law.”

- Preference program
- Promotion program
- Review and monitoring program

While the notice is only the U.S. Department of Agriculture's proposed framework for designating biobased products for purchase by Federal agencies, the notice also “particularly seeks public comment on the proposed categories and items, and the reasonableness of the biobased content percentages, discussed below.” Although the notice lists product categories and percentages, USDA's intent is these are potential product categories they might propose depending on the comments received.

<b>Product Category</b>	<b>Percent by Weight</b>	<b>Source/Benefits</b>
<b>Adhesives and products containing adhesives:</b> Book bindings Boxes - corrugated Doors Envelopes Labels Lumber (glulam beams, I-joists) Furniture Paper bonds Stamps Sutures Tapes (clear, duct, masking) Windows	70%/adhesive 90%/product	Starch from corn, potatoes, wheat, tapioca, and other plants; casein from skimmed milk; soy protein; soybean oil; vegetable gums; gelatin; livestock derivatives; tannins from woody biomass; and marine animal derivatives  Reduce total amount of phenol-formaldehyde and isocyanate-containing adhesives used to bond plywood and other panels

<b>Construction Materials and Composites, including products with adhesives</b> Appliance molded cases, covers Beams - laminated Board – oriented strand Building materials Cabinets Carpet, incl. backing and pad Composites Computers Concrete (starch/vegetable compounds added during setting reduce density) Concrete mold release agents Cushions - foam Dashboards - automotive Fiberboard – medium density Fixtures - store Foam – rigid and soft Furniture Hardboard Insulating foams – rigid for appliances Insulation – fiber and foam Lumber, incl. plastic wood composite Pads – furniture, etc. Panels – nonstructural Plaques - award Plywood Seats - automotive Shingles Siding Signs Tabletops Telephones Trim Trophies Wood - round	85% construction 70% composite 10% molded reinf. 15% insulat. foam 20% mixed	Bamboo, cereal grain straws, corn, polylactides, corn stover, kenaf, guayule, paper, soybean oil polyol, straw, sugar cane bagasse, vegetable fiber, vegetable oil polyesters, wood byproducts (chips, flour, sawdust, shavings)
<b>Construction – products with biobased adhesives</b> Beams - laminated Board – oriented strand Composites – decorative Fiberboard – medium density Hardboard Lumber – finger jointed/oriented Strand		

Molding Plywood Roof trusses Trim		
<b>Fibers, Paper, Packaging</b> Boxes Cabinets Displays - store Drums Furniture Packaging Pails Panels – lightweight honeycomb Paper Paperboard Ropes Textiles Yarns	90% fibers 30% fib.composites 30% comp.pkg.mat. 75% woven fibers 80% pkg materials 20% paper 50% bristols 20% newsprint 30% tissue 30% paperboard 50% other	Bamboo, cornstarch, corn stover, cotton (low-grade), flax, kenaf, leaves, poultry feathers, potato starch, rice, saw dust, straw, sugar cane bagasse, switch grass, wheat, wood by products (chips, forest thinnings, grindings, sawdust, shavings, tree curls)

<p><b>Fuel Additives</b> – enhance a fuel's combustion or other properties</p> <p>Heat buildings Power vehicles Steam heat</p> <p><b>Solid fuel additives</b> *Brickets *Pellets</p> <p><b>Liquid fuel additives</b> *Biodiesel *Ethanol</p>	<p>5%</p> <p>80%</p>	<p>Animal fat, canola, corn, byproducts or crop/processing residues (cooking oil, cotton, hulls, manure, nonrecyclable paper, paper sludge, soy, stalks, sugar), rape seed, soybean, wood</p> <p>Wood, wood residue</p>
<p><b>Inks – Plant and Vegetable (no VOCs)</b> Soy ink (newspapers)</p>	<p>20% forms</p> <p>10% headset</p> <p>40% news – black</p> <p>30% news – color</p> <p>20% sheet fed</p> <p>20% specialty</p>	<p>Soybean oil</p>
<p><b>Landscaping Materials, Compost, Fertilizer</b></p> <p>Compost Fertilizer Landscaping materials (bark, chips, mulch)</p>	<p>100%</p> <p>80%</p> <p>100%</p>	<p>Biobased coatings, construction materials, fibers, manure, paper, sorbents, straws, woody crops</p>



<b>Lubricants and Functional Fluids</b> 2-cycle engine oil additives for chain saws lawnmowers string trimmers other small machinery  Dielectric fluids for transformers  Heavy machinery, mobile equipment *Brake fluid *Coolants *Crankcase oil/grease *Hydraulic fluid *Lubricants *Metal working fluid (cutting/drilling oil/lubricant) *Oil – bar, chain, sprocket *Power steering fluid *Process fluid *Transmission fluid  Release Agents for Forms Molds	10% crank.oil-h2o 50% crank.oil-air 50% 2-cycle eng. 40% 5 <sup>th</sup> whl grease 25% auto grease 50% loss lub.-chain 50% turbine lub. 50% penetrating oil 90% gen. purpose 50% hydraulic fluid 20% brake fluid 50% drilling oil 30% metal wrking 30% stamping 70% concrete rel. 50% metal foundry 70% transformer oil	Animal fat, canola, corn, plant materials, rapeseed, soybean, sun flower
<b>Paints and Coatings</b> Coatings – architectural, marine Corrosion inhibitors Paint Polishes Sealers – concrete, wood Stains	20% formulated product	Cellulose esthers/ethers, corn, guayule epoxy-amine, linseed oil, soy, soybean oil, wheat, xanthan gum

<b>Plastics</b> Biodegradeable films Biodegradeable foams Compostable molded products Durable films, coatings Durable foams Molded composites/biobased fibers Molded plastics, comp., biobased resins Synthetic fibers Water soluble polymers	25% 50% 75% 20% 15% 20% 10% 50% 50%	Starch in corn, potatoes, tapioca, wheat
<b>Solvents and Cleaners</b> Carrier solvent for paints, inks, lotions Cleaning – fabric, fruit/vege, paint, etc.	50% formulated 100% concentrate	Crops, livestock
<b>Sorbents</b> Absorb spills (blood, fluids, oil, urine)	90% sorbents 75% sorbent syst.	Corn stover, cotton, cotton linters, kenaf, peanut hulls, vegetable starch, wool

## **DOE ENVIRONMENTALLY PREFERABLE PROCUREMENT FORECAST OPPORTUNITIES**

### **Fiscal Year 2005**

Cleaning Services – Sub Contract  
Savannah River Operations Office  
Set-aside for Small Business  
RFP Release Date: 1st Quarter  
Anticipated award Date: 2<sup>nd</sup> Quarter  
Current Contract Number: C001810N  
Acquisition POC: Susan Goodwin, 803-952-6091

Construction of Building – Sub Contract  
Stanford Linear Accelerator Center  
RFP Release Date: 2<sup>nd</sup> Quarter  
Anticipated Award Date: 2<sup>nd</sup> Quarter  
Current Contract Number: None  
Acquisition POC: 650-926-3300

Construction of Gate House and Badge Office – Sub Contract  
Thomas Jefferson National Accelerator Facility  
Set-aside for Small Business  
RFP Release Date: 3<sup>rd</sup> Quarter  
Anticipated Award Date: 4<sup>th</sup> Quarter  
Current Contract Number: None  
Acquisition POC: Ross Small, 757-269-7603

Construction of Refrigeration Service Buildings – Sub Contract  
Thomas Jefferson National Accelerator Facility  
Set-aside for Small Business  
RFP Release Date: 4<sup>th</sup> Quarter  
Anticipated Award Date: 1<sup>st</sup> Quarter  
Current Contract Number: None  
Acquisition POC: Ross Small, 757-269-7603

Construction of Road – Sub Contract  
Thomas Jefferson National Accelerator Facility  
Set-aside for Small Business  
RFP Release Date: 2nd Quarter  
Anticipated Award Date: 3rd Quarter  
Current Contract Number: None  
Acquisition POC: Ross Small, 757-269-7507

Attachment 2

Construction of Road – Sub Contract  
Thomas Jefferson National Accelerator Facility  
Set-aside for Small Business  
RFP Release Date: 1st Quarter  
Anticipated Award Date: 2nd Quarter  
Current Contract Number: None  
Acquisition POC: Ross Small, 757-269-7121

Construction Services – Sub Contract  
Bechtel National, Inc. Office of River Protection  
RFP Release Date: 3<sup>rd</sup> Quarter  
Anticipated Award Date: 4<sup>th</sup> Quarter  
Current Contract Number: None  
Acquisition POC: Mike Jewell, 509-371-2703

Construction Services – Sub Contract  
Lawrence Livermore National Laboratory  
RFP release Date: 1<sup>st</sup> Quarter  
Anticipated Award Date: 3<sup>rd</sup> Quarter  
Current Contract Number: H617000  
Acquisition POC: 925-422-4816

Elevator Maintenance – Sub Contract  
Savannah River Operations Office  
Sole Source  
RFP Release Date: 3<sup>rd</sup> Quarter  
Anticipated Award Date: 4<sup>th</sup> Quarter  
Current Contract Number: None  
Acquisition POC: Susan Goodwin, 803-952-6091

Facility Maintenance – Sub Contract  
Savannah River Operations Office  
Sole Source  
RFP Release Date: 4<sup>th</sup> Quarter  
Anticipated Award Date: 4<sup>th</sup> Quarter  
Current Contract Number: AC13133M  
Acquisition POC: Susan Goodwin, 803-952-6091

Flooring and Floor Covering – Sub Contract  
Lawrence Livermore National Laboratory  
RFP Release Date: 1<sup>st</sup> Quarter  
Anticipated Award Date: 3<sup>rd</sup> Quarter  
Current Contract Number: H643800  
Acquisition POC: 925-422-4816

Janitorial Services – Prime Contract  
Richland Operations Office  
Set-aside for Sole Source 8(a)  
RFP Release Date: 1<sup>st</sup> Quarter  
Anticipated Award Date: 3<sup>rd</sup> Quarter  
Current Contract Number: DE-AC06-00RL14144  
Acquisition POC: Rich Hague, 509-373-3352

Janitorial Supplies – Sub Contract  
Nevada Operations Office  
Set-aside for Small Business  
RFP Release Date: 1<sup>st</sup> Quarter  
Anticipated Award Date: 2<sup>nd</sup> Quarter  
Current Contract Number: 31440  
Acquisition POC: Procurement at 702-295-2150

Laundry Services – Sub Contract  
Lawrence Livermore National Laboratory  
RFP Release Date: 1<sup>st</sup> Quarter  
Anticipated Award Date: 3<sup>rd</sup> Quarter  
Current Contract Number: H553600  
Acquisition POC: 925-422-4816

Office Infrastructure – Sub Contract  
Kansas City Site Office  
Set-aside for Small Business  
RFP Release Date: 1<sup>st</sup> Quarter  
Anticipated Award Date: 2<sup>nd</sup> Quarter  
Current Contract Number: None  
Acquisition POC: 816-997-4700

Rehab Kitchen – Sub Contract  
Thomas Jefferson National Accelerator Facility  
Set-aside for Small Business  
RFP Release Date: 3<sup>rd</sup> Quarter  
Anticipated Award Date: 4<sup>th</sup> Quarter  
Current Contract Number: None  
Acquisition POC: Ross Small, 757-269-7603

Repair and Install Door – Sub Contract  
Lawrence Livermore National Laboratory  
RFP Release Date: To Be Determined  
Anticipated Award Date: 2<sup>nd</sup> Quarter  
Current Contract Number: H531800  
Acquisition POC: 925-422-4816

Re-roof Building – Sub Contract  
Stanford Linear Accelerator Center  
RFP Release Date: 3<sup>rd</sup> Quarter  
Anticipated Award Date: 3<sup>rd</sup> Quarter  
Current Contract Number: None  
Acquisition POC: 650-926-3300

Re-roof Building – Sub Contract  
Thomas Jefferson National Accelerator Facility  
Set-aside for Small Business  
RFP Release Date: 1<sup>st</sup> Quarter  
Anticipated Award Date: 2<sup>nd</sup> Quarter  
Current Contract Number: None  
Acquisition POC: Ross Small, 757-269-7603

Technical Assistance (May include Conservation Landscaping) – Prime  
Office of Energy Efficiency and Renewable Energy  
Set-aside for Small Business  
RFP Release Date: 1<sup>st</sup> Quarter  
Anticipated Award Date: 2<sup>nd</sup> Quarter  
Current Contract Number: None  
Acquisition POC: Hon Olsen, 303-275-4722

Truck Maintenance – Sub Contract  
Savannah River Operations Office  
Set-aside for Small Business  
RFP Release Date: 3<sup>rd</sup> Quarter  
Anticipated Award Date: 4<sup>th</sup> Quarter  
Current Contract Number: C001869N  
Acquisition POC: Bruce Way, 803-952-9015

## **DOE EPP FORECAST OPPORTUNITIES**

### **Fiscal Year 2006**

Building Management System Maintenance – Sub Contract  
Savannah River Operations Office  
Sole Source  
RFP Release Date: 3<sup>rd</sup> Quarter  
Anticipated Award Date: 4<sup>th</sup> Quarter  
Current Contract Number: None  
Acquisition POC: Susan Goodwin, 803-952-6091

Construction of Buildings – Sub Contract  
Thomas Jefferson National Accelerator Facility  
Set-aside for Small Business  
RFP Release Date: 1st Quarter  
Anticipated Award Date: 2nd Quarter  
Current Contract Number: None  
Acquisition POC: Ross Small, 757-269-7603

Construction of Offices – Sub Contract  
Thomas Jefferson National Accelerator Facility  
Set-aside for Small Business  
RFP Release Date: 2nd Quarter  
Anticipated Award Date: 3rd Quarter  
Current Contract Number: None  
Acquisition POC: Ross Small, 757-269-7603

Construction of Parking Lot – Sub Contract  
Thomas Jefferson National Accelerator Facility  
Set-aside for Small Business  
RFP Release Date: 2nd Quarter  
Anticipated Award Date: 3rd Quarter  
Current Contract Number: None  
Acquisition POC: Ross Small, 757-269-7603

Construction of Road Extension – Sub Contract  
Thomas Jefferson National Accelerator Facility  
Set-aside for Small Business  
RFP Release Date: 2nd Quarter  
Anticipated Award Date: 3rd Quarter  
Current Contract Number: None  
Acquisition POC: Ross Small, 757-269-7603

Construction Services – Sub Contract  
Bechtel National, Inc. Office of River Protection  
RFP Release Date: 1<sup>st</sup> Quarter  
Anticipated Award Date: 4<sup>th</sup> Quarter  
Current Contract Number: None  
Acquisition POC: Mike Jewell, 509-371-2703

Custodial Services – Sub Contract  
Office of Civilian Radioactive Waste Management  
Set-aside for National Industry for the Severely Handicapped  
RFP Release Date: 2<sup>nd</sup> Quarter  
Anticipated Award Date: 4<sup>th</sup> Quarter  
Current Contract Number: DE-AC28-01RW12155

Attachment 2

Acquisition POC: Karen Pigeo, 702-794-5074

Food Services – Sub Contract  
Lawrence Livermore National Laboratory  
RFP Release Date: To Be Determined  
Anticipated Award Date: 2<sup>nd</sup> Quarter  
Current Contract Number: B512880  
Acquisition POC: 925-422-4816

Grounds and Administrative Support – Prime  
Albuquerque Operations Office  
Competitive 8(a)  
RFP Release Date: 1<sup>st</sup> Quarter  
Anticipated Award Date: 3<sup>rd</sup> Quarter  
Current Contract Number: DE-AC04-02AL67184  
Acquisition POC: Office of Contracts and Procurement, 505-845-5849

Janitorial Services – Sub Contract  
Nevada Operations Office  
Competitive 8(a)  
RFP Release Date: 4<sup>th</sup> Quarter  
Anticipated award Date: 1<sup>st</sup> Quarter  
Current Contract Number: 30593  
Acquisition POC: Procurement, 702-295-2150

Janitorial Services – Sub Contract  
Fermi National Accelerator Laboratory, Office of Science  
RFP Release Date: 1<sup>st</sup> quarter  
Anticipated Award Date: 2<sup>nd</sup> Quarter  
Current Contract Number: None  
Acquisition POC: Joe Collins, 630-840-4169

Janitorial Services – Sub Contract  
National Renewable Energy Laboratory, Golden Field Office  
Set-aside for Small Business  
RFP Release Date: To Be Determined  
Anticipated Award date: To Be Determined  
Current Contract Number: ACM-1-31802-01  
Acquisition POC: Jeff Soltesz, 303-384-7409

Linen Laundry Services – Sub Contract  
Nevada Operations Office  
Set-aside for Small Business  
RFP Release date: 1<sup>st</sup> Quarter  
Anticipated award Date: 1<sup>st</sup> Quarter  
Current Contract Number: 31293



## Attachment 2

Acquisition POC: Procurement at 702-295-2150

Rehab Kitchen Equipment – Sub Contract  
Thomas Jefferson National Accelerator Facility  
Set-aside for Small Business  
RFP Release Date: 3<sup>rd</sup> Quarter  
Anticipated Award Date: 4<sup>th</sup> Quarter  
Current Contract Number: None  
Acquisition POC: Ross Small, 757-269-7603

Re-roof Building – Sub Contract  
Stanford Linear Accelerator Center  
RFP Release Date: 3<sup>rd</sup> Quarter  
Anticipated Award Date: 3<sup>rd</sup> Quarter  
Current Contract Number: None  
Acquisition POC: 650-926-3300

### **DOE EPP FORECAST OPPORTUNITIES**

#### **Fiscal Year 2007**

Building and Paint Supplies – Sub Contract  
Nevada Operations Office  
RFP Release Date: 1<sup>st</sup> Quarter  
Anticipated Award Date: 1<sup>st</sup> Quarter  
Current Contract Number: 35723  
Acquisition POC: Procurement at 702-295-2150

Building Maintenance Support Services  
Savannah River Operations Office  
RFP Release date: 1st Quarter  
Anticipated Award Date: 1<sup>st</sup> Quarter  
Current Contract: AC 29995N  
Acquisition POC: Susan Goodwin, 803-952-6091

Construction of Facility – Prime  
Sandia National Laboratories  
RFP Release: To Be Determined  
Anticipated Award Date: To Be Determined  
Current Contract Number: None  
Acquisition POC: Rhonda Dukes, 505-844-3565

Attachment 2

Construction of Refrigeration Service Buildings – Sub Contract  
Thomas Jefferson National Accelerator Facility (Jefferson Lab)  
Set-aside for Small Business  
RFP Release Date: 2<sup>nd</sup> Quarter  
Anticipated Award Date: 3<sup>rd</sup> Quarter  
Current Contract Number: None  
Acquisition POC: Ross Small, 757-269-7603

Construction Services – Sub Contract  
Bechtel National, Inc. Office of River Protection  
RFP Release Date: 2<sup>nd</sup> Quarter  
Anticipated Award Date: 3<sup>rd</sup> Quarter  
Current Contract Number: None  
Acquisition POC: Carrie Brittain, 509-371-2703



# **HEADQUARTERS POLICY FLASH**

## **POLICY FLASH 2004-24**

DATE: September 2, 2004  
TO: Procurement Directors  
FROM: Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

SUBJECT: Department of Energy (DOE) Acquisition Guide Chapter Revisions

SUMMARY: Several chapters of the DOE Acquisition Guide have been revised and posted to the Home Page. The next page lists the chapters and summarizes the nature of the changes.

## Summary

### DOE Acquisition Guide 2004 Revision Installment 3

Number	Title	Nature of Change	Date
4.2	Public Relations Contracts	New	August 2004
15.3	Evaluation Criteria	Editorial	August 2004
15.4	Source Selection	Editorial	August 2004
33.1	Protests	Editorial	August 2004
33.2	Alternate Dispute Resolution	Editorial	August 2004
38.1	Federal Supply Schedule Contracting	Substantive/Editorial	August 2004

Chapter 4.2, Public Relations Contracts is a new chapter replacing Acquisition Letter 2002-03. It requires coordination with the Office of Public Affairs, DOE or National Nuclear Security Administration (NNSA), prior to contracting for public relations or communication services requirements.

Chapter 38.1, Federal Supply Schedule Contracting is an update of the Strategic Acquisition Transactions Guide of 2002, in response to Policy Flash 2004-23, "Proper Use of Other Agencies Contracts". It clarifies and improves procedures to be followed when placing awards under other Agency contracts, such as Federal Supply Schedules (FSS) and Government-wide Agency Contracts (GWACs), as well as ordering procedures under Multiple Award Contracts. It provides that the Contracting Officer placing an order on another agency's behalf is responsible for including that agency's regulatory and statutory requirements and that the requiring agency must furnish such information to the ordering agency. It also states that Blanket Purchase Agreements (BPAs) under FSS are generally limited to five years and requires the agency establishing the BPA under a schedule contract to conduct an annual review to assure that the circumstances justifying the initial award remain current. While not prohibiting sole source awards under FSS orders, the Chapter does require they be justified in writing. The Chapter further provides that ordering agencies rely on the small business representation originally furnished at the contract level and clarifies steps that may be taken in the case of poor performance under an FSS order.

The changes to the other Chapters are only editorial in nature.

The revised chapters are not attached but have been posted to the Home Page at <http://professionals.pr.doe.gov/ma5/ma-5web.nsf/?Open> Questions may be addressed to Richard Langston (202) 287-1339 or [Richard.Langston@hq.doe.gov](mailto:Richard.Langston@hq.doe.gov).



Michael P. Fischetti, Director  
Office of Procurement and  
Assistance Policy  
Office of Procurement and  
Assistance Management

cc: PPAG

## Requirements for Contracting with Public Relations Firms



### Guiding Principles

- Be Aware of Requirement
- Ensure Coordination

### Overview

This section discusses the Department of Energy's (DOE's) procedures when obtaining contractual services from public relations firms.

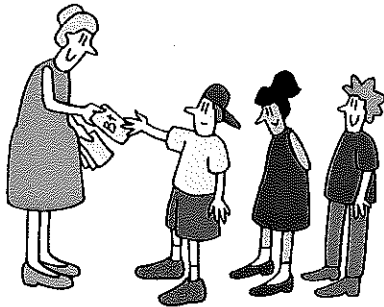
### Background

The Office of Public Affairs is responsible for collecting and disseminating information about the Department's programs, missions, and activities. The Office of Public Affairs establishes guidelines for the review and coordination of activities for that mission. These activities include coordination on contracts to public relations firms that assist program offices in collecting and disseminating information.

### Current Requirements

All DOE contract actions for the acquisition of public relations or communications tasks are to be coordinated with the Headquarters Office of Public Affairs, PA-40 prior to being initiated. National Nuclear Security Administration offices should coordinate through NA-3.5, Office of Congressional, Intergovernmental and Public Affairs. The procurement request initiator is responsible for this coordination prior to submitting the procurement request to the cognizant procurement office. Contracting Officers should not process any requirement for public relations or communications tasks without the consent of the Office of Public Affairs. Requests received without said consent should be returned to the initiator for action. Communications tasks do not encompass contracts for telephone service.

## Establishing Evaluation Criteria



[Reference: FAR 15.304]

### Overview

This section discusses the development of evaluation criteria for use in best value, competitive source selection.

### Background

The purpose of the proposal evaluation process is to provide a mechanism to determine which offers submitted in response to a solicitation best meet the Government's stated needs. The proposal evaluation results in an assessment of the offeror's ability to successfully accomplish the contract. Because the source selection decision is based on the proposal evaluation, it is important that the evaluation criteria *clearly reflect the Government's need and facilitate preparation of proposals that best satisfy that need; provide for an accurate evaluation of an offeror's proposal; represent key areas of importance and emphasis to be considered in the source selection decision; and support meaningful discrimination and comparison between and among competing proposals.*

### Establishing Evaluation Criteria

The evaluation criteria used to assess proposals consist of the factors and sub-factors that reflect the areas of importance to an agency in its selection decision. Through the evaluation factors, the Government is able to assess the similarities and differences and strengths and weaknesses of competing proposals and, ultimately, use that assessment in making a sound source selection decision. A well-integrated evaluation scheme provides consistency, discipline, and rationality to the source selection process.

Consistent with the FAR, the evaluation criteria and their relative importance shall be expressed in the solicitation and proposals shall be evaluated only on the basis of those criteria. In addition, the solicitation must state the relative importance of price to all of the other evaluation criteria. In doing so, offerors are informed of the factors that the Government will consider in determining

#### Guiding Principles

Evaluation criteria must represent the key areas of importance.

Always include cost/price and quality.

More important criteria should be weighted greater than less important criteria.

Proposals are to be evaluated solely on the factors and sub-factors stated in the solicitation.

which proposal best meets its needs, and may use this information to determine how to best prepare their proposals.

The FAR provides broad guidance on establishing evaluation criteria. In summary, this guidance (see 15.304) provides that:

Evaluation criteria should be tailored to each acquisition and include only those factors which will have an impact on source selection.

The nature and types of evaluation criteria to be used for an acquisition are within the broad discretion of the agency.

Price or cost must be an evaluation factor in every source selection.

Past performance must be an evaluation factor (in accordance with the FAR criteria in 15.304), unless the contracting officer, *in writing*, determines otherwise.

Quality must be addressed in every source selection in "non-cost factors."

As a rule of thumb, evaluation criteria should reflect areas *necessary* to determine the merit of a proposal, *pertinent* to the Government's stated requirements, and *measurable* to permit qualitative and quantitative assessment against the rating plan.

*Cost Factors* - As previously noted, the FAR requires that cost or price must be evaluated in every source selection. Because contracts can only be awarded at costs or prices that have been determined to be reasonable, cost reasonableness always must be evaluated. In addition, cost realism (an assessment of whether the costs proposed by an offeror are realistic, reflect a clear understanding of the work, and are consistent with other parts of the proposal) must be considered when a cost-reimbursement contract is contemplated.

In some instances, the evaluation of cost or price may include not only consideration of the cost or price to be paid to the contractor, but other costs that the Government may incur as a result of awarding the contract. Examples of these latter costs include re-training costs, system or software conversion costs, power consumption, life cycle costs, and transportation costs. In these cases, the solicitation should clearly identify other costs that will be considered in the evaluation.

*Non-Cost Factors* - Non-cost factors address the evaluation areas associated with technical and business management aspects of the proposal. Examples of non-cost factors include technical and business management related areas such as technical approach and understanding, capabilities and key personnel, transition plans, management plan, management risk, and corporate resources. The level of quality needed by the Government in performance of the contract is an important consideration in structuring non-cost factors.



**Evaluation Standards**

The development and use of standards is the key to uniform application of evaluation criteria. Standards establish the minimum level of acceptability for a requirement and provide the basis on which the ratings above and below the minimum level are set. Stated another way, a standard is the measurement baseline that will be used by the Government evaluator to determine whether a proposal meets, exceeds, or fails to meet a solicitation requirement. Standards, by providing a consistent and uniform measurement target, promote an objective evaluation of proposals.

Standards may be quantitative or qualitative in nature. Regardless of whether a standard is quantitative or qualitative in nature, the standard should be:

Structured to specify the minimum acceptable level and the levels above and below the minimum that ratings can be assigned.

Developed using precise language that is clearly and easily understood by the evaluators.

Structured to evaluate substance, not form.

Consistent with the minimum requirements of the Statement of Work.

In developing standards, there sometimes is a tendency to be overly aggressive by establishing highly detailed, or a large number of, standards under the assumption that this approach will improve the quality of the evaluation. In most cases, the result is just the opposite. Too many, or overly detailed, evaluation standards may lead to a leveling of ratings and thereby result in an inability to meaningfully discriminate among proposals. Conversely, standards that are overly broad also may make differentiation between proposals difficult and frustrate evaluators' efforts to agree on ratings. Likewise, "go/no go" standards are not as effective in best value decisions because they do not adequately identify varying degrees of superiority or inferiority.

**Relative Importance of Evaluation Criteria**

After determining the evaluation criteria, their relative importance must be established. The relative importance of the factors and sub-factors that comprise the evaluation criteria must be consistent with the source selection objectives and the solicitation requirements. There are several methods that may be used to establish the relative importance of the evaluation criteria. The first approach involves statements that establish a prioritization or tradeoff between factors. For example, the evaluation scheme may provide that cost is slightly more important than "technical approach" but less important than "key personnel." The relative importance of criteria also may be structured through the use of numerical weights, such as points or percentages. Using the previous example, cost would be "twice as important as performance risk, but half as important as technical approach." A third way to express the relative importance of evaluation criteria is through the use of decision rules. Essentially, a decision rule is a judgmental statement that is used to determine how a criterion will be treated under certain conditions. One way of expressing a decision rule would be "if the management factor is rated less than satisfactory, then

the entire proposal is unacceptable." Of these three possible approaches, the use of a prioritization or trade-off technique provides greatest flexibility for the source selection official when making trade-off decisions between non-cost factors and the evaluated cost/price.

### **Rating Mechanisms**

The FAR does not prescribe one best approach for rating proposals. Accordingly, agencies are free to design rating plans which best meet their needs in light of the facts, circumstances, and requirements of a particular procurement. Typically, numerical, adjectival, or color coding rating schemes have been relied on for proposal evaluations. The key in using a rating system is consistent application by the evaluators. Regardless of the approach selected, supporting narrative documentation should be developed which explains the basis for the ratings, and identifies strengths, weaknesses and discriminators.

### **Special Considerations for Management and Operating Contract Solicitations**

Because of the unique nature of the Department's management and operating contracts, care must be taken to ensure that the evaluation criteria accurately embody DOE's fundamental requirements and expectations for successful management of the facility or site in the future, consistent with contract reform. In the past, solicitations have been structured to reward offerors for past performance and management team experience directly related to the mission of the facility or site (i.e., weapons production).

As the Department undergoes radical change both in the nature of many of its missions and in the way it accomplishes those missions, DOE's requirements for management experience and approaches are different from what was required of offerors in the past. Accordingly, an offeror's direct past management experience and expertise in operating Department of Energy facilities and sites may be less important than experience and expertise in such areas as managing organizations during periods of change, cost containment, innovation, economic development, workforce restructuring, and technology development.

## Source Selection Guide



### Overview

Recent regulation changes have introduced greater flexibility and discretion into the source selection process. This section provides guidance to contracting staff on conducting source selection.

### Background

The last decade has seen significant change in many areas of procurement, particularly in the introduction of new tools and processes that help the procurement professional better meet the needs of demanding customers. The passage of the Federal Acquisition Reform Act in 1995 and the Federal Acquisition Streamlining Act in 1994, coupled with Government-wide and Department of Energy (DOE) contract reform efforts have not only changed traditional procurement processes but have also changed the role of the procurement professional. No longer are procurement professionals merely the keepers of what some view as an arcane process called Federal contracting.

One area that has received considerable attention in most all of the reform initiatives is source selection, as set forth in Part 15 of the Federal Acquisition Regulation (FAR).

In 1998, significant, and sometimes subtle, changes were made to long-standing policies, practices and procedures relating to competitive negotiation. These included the introduction of oral presentations, changes in the standards for determining competitive range, and new rules governing communications and the submission of best and final offers. These changes place an even greater responsibility on today's procurement professional to ensure that the integrity and fairness of procurement is maintained and that the contract ultimately awarded delivers high-quality goods and services to the customer.

### General

In today's world, the procurement professional needs to be not only an expert in procurement laws, regulations and policies, but also an expert in business and market areas. The procurement

professional is now an integral part of a team that manages all phases of the acquisition process, from requirements identification to contract close-out. This is reinforced in guiding principles for the Federal Acquisition System (see FAR 1.102).

This guide provides a series of topics-focused dissertations on key areas of source selection. The intent of the guide is to present DOE procurement professionals with useful "hands-on" information on key principles and practices that will enhance the effectiveness of the source selection process. The guide does not present a road map of the source selection process, nor does it mandate activities or actions. The source selection process is adequately set out in regulation and other instruction material. This guide should not be construed to convey any rights to third parties.

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**PART I DRAFT REQUEST FOR PROPOSAL (DRFP)****Background**

The Draft Request For Proposal (DRFP) is the initial, informal document(s) that communicates the Government's intentions/needs to industry and requests questions, comments, suggestions, and corrections that improve the final product. It is a communication tool used early in competitive acquisitions to promote a clearer understanding of the Government's requirements to industry and to obtain industry feedback on the planned acquisition. The DRFP need not include all of the sections of the Request For Proposal (RFP), but should contain as much as possible of the "business" sections necessary for industry to provide meaningful comments. As a minimum, the DRFP should include Section L (Instructions to Offerors) and Section M (Evaluation Criteria), and the Specification/Statement of Work.

No hard and fast rule exists as to when it is desirable to issue a DRFP; however, in the early stages of acquisition planning/procurement strategy development, the program officer(s), advisory (legal) staff and Contracting Officer/Contract Specialist are strongly encouraged to address the desirability of issuing a DRFP in advance of the final RFP. Likewise, no formal process for comment resolution presently exists. However, a methodology should be established to ensure implementation of beneficial comments in the final RFP as well as ensuring fair disposition of all comments.

**Applicable statutes, procurement regulations, or small business regulations**

FAR 3.104-2 (General [Procurement Integrity]); FAR 15.201(Exchanges with Industry Before Receipt of Proposals); and FAR 5.101(b) (Methods of Disseminating Information)

**Issues/Questions**

- When is it appropriate to issue a DRFP?
- What should a DRFP include?
- What are the requirements for publicizing a DRFP?
- What benefits are accrued from issuing a DRFP in advance of issuing a final RFP?
- How should comments received in response to the DRFP be handled?

**Discussion Topics****When is it appropriate to issue a Draft Request for Proposal (DRFP)?**

It is appropriate to use DRFP's whenever, in the Contracting Officer's (CO's) judgment, the acquisition will benefit significantly from early involvement from interested parties. Considerations in determining the feasibility of issuing a DRFP in advance of an RFP for an acquisition include: complexity and dollar value, introduction of new business and/or technical

requirements, timing and/or uncertainties as to the clarity of the proposed Statement of Work/Statement of Objective. DRFP's are not used for a noncompetitive procurement.

**What should a Draft Request for Proposal (DRFP) include?**

To the extent practicable, the DRFP should include all relevant parts of the solicitation, including the model contract, Statement of Work (SOW), technical requirements, instructions to offerors (Section L), and the evaluation criteria (Section M). The DRFP should identify the point of contact to which comments should be directed, the preferred method by which contact may be established, i.e., via e-mail, facsimile, and the date by which all comments are due, etc. The DRFP should include a statement to the effect that "information presented in the DRFP is subject to change and that incurring expenses or beginning to formulate an approach in preparation for the acquisition based on information presented in the DRFP is solely at the potential offerors risk".

**What are the requirements for publicizing a DRFP?**

The Contracting Officer/Contract Specialist should publicize the DRFP in much the same manner as the final RFP would be publicized, using a variety of methods, such as posting announcements on the INTERNET using Federal Business Opportunities for Vendors (FBO for Vendors) at <http://www.ebs.gov/spg/>, posting the DRFP on the DOE Industry Interactive Procurement System (IIPS) at <http://e-center.doe.gov> and those methods addressed at FAR 15.201(c) and FAR 5.101(b). Publication and response times for proposed contract actions at FAR 5.203 are not mandatory for DRFPs. The Contracting Officer should establish reasonable times for receipt of responses to DRFPs that reflect the nature of the product or service, the supply base, and the specifics of the individual procurement. Requirements shall be synopsized in accordance with FAR 5.203 prior to issuance of the solicitation. Alternatively, the notice of availability of a DRFP and a future date when the solicitation will be issued may be included in the same synopsis.

**What benefits are accrued from issuing a DRFP in advance of issuing a final RFP?**

DRFP's provide an effective means to resolve potential contract issues and obtain feedback from prospective offerors in advance of issuing the final RFP. In certain cases, such information can lead to (1) significant cost savings and productivity enhancements; (2) reduce proposal preparation and evaluation time; (3) reduce the need for solicitation amendments and preclude other delays that disrupt timely completion of the acquisition; or (4) result in better proposals, end products and services.

**How should comments received in response to the DRFP be handled?**

The Contracting Officer/Contract Specialist, in conjunction with support from appropriate technical or other functional advisory staff as merited (i.e., cost price analysts, legal counsel, Small and Disadvantaged Business Specialist) should carefully review each question to: (1) determine whether the suggestion has merit and should be pursued; (2) develop a recommended

course of action considering the impact to other processes and elements of the RFP or program; and (3) develop a proposed Government response. Care must also be taken to ensure that incorporating a comment into the RFP does not give an unfair competitive advantage to an offeror.

Though not mandatory, two suggested means by which the Contracting Officer/Contract Specialist may disseminate the government's response to industry are:

(1) A DRFP Amendment or letter may be prepared that formally responds to the comments received. This response may group similar questions together for a single response. The amendment or letter should not attribute comments to any particular offeror. The amendment or letter should include a clear statement as to the comments disposition, i.e., accepted, rejected, deferred, etc., along with an explanation as to why that action was taken. The response should be made publicly available in the same manner as the DRFP.

(2) If the nature of the comment or the government response is complex, it may be beneficial for the government to convene a presolicitation conference to discuss the responses to the DRFP comments. Notice of the conference should be publicly announced in a manner to ensure that all interested parties/potential offerors have an opportunity to respond/attend. Minutes of the conference should be maintained which include a written response to all of the DRFP comments received. Copies of these minutes should be publicly distributed in the same manner as the DRFP, e.g., through posting on the website.

Regardless of which response method or combination of methods is used, it is critical that all potential offerors be treated fairly and given identical information so as not to provide a basis for a perception of unfair competitive advantage by any one offeror or group of offerors.

If a private conference is requested, the Contracting Officer/Contract Specialist must take special care to ensure that either: (1) no additional information is provided during the conference which would give the offeror an unfair competitive advantage; or (2) ensure that any new information provided during the conference is provided to all potential offerors.

**PART II PREPROPOSAL CONFERENCES****Background**

A preproposal conference is a technique to promote early exchange of information with industry after the solicitation is issued, and prior to receipt of proposals. The principal purpose of a preproposal conference is to provide for uniform interpretation and understanding of work statements, specifications, and other technical and administrative requirements by all prospective contractors responding to competitive solicitations.

Additionally, in conducting the preproposal conference, remember the following: (1) release information on a fair and equitable basis consistent with regulatory and legal restrictions; (2) establish clear ground rules for the conduct, timing, and documentation of preproposal conferences; (3) protect any proprietary information you may be given during this process; and (4) request legal counsel advice if any questions arise about any preproposal exchanges.

**Applicable statutes, procurement regulations, or small business regulations**

FAR 3.104-2 (General [Procurement Integrity]); and FAR 15.201 (Exchanges with Industry Before Receipt of Proposals)

**Issues/Questions**

- When is it appropriate to conduct a preproposal conference?
- What should preproposal conferences accomplish?
- How should the preproposal conference be conducted?

**Discussion Topics****When is it appropriate to conduct a preproposal conference?**

It is appropriate to conduct a preproposal conference when issues exist which make a government and industry dialogue necessary. The following factors often drive a need to conduct a preproposal conference: (1) the complexity of the project; (2) the desirability of having prospective contractors visually examine Government owned facilities (Site visits are normally conducted in conjunction with preproposal conferences); (3) the need to disseminate additional background data; (4) exceptional demands on a contractor's capability; (5) unavoidable ambiguities in the statement of work; or (6) complications involving access to classified material.

**What should preproposal conference accomplish?**

The preproposal conference should accomplish the following: (1) outline principal features of the project, (2) fully describe all details of the work statement and specifications, (3) explain and clarify instructions for completing the proposal, (4) provide an opportunity for offerors to ask



questions and receive answers, thus providing them with a better understanding of the government's requirements, and (5) stress the importance of significant elements of the solicitation.

### **How should the preproposal conference be conducted?**

The Contracting Officer should publicize the arrangements for the conference in the solicitation. Attendees should be advised that remarks and explanations made by government personnel do not qualify, change, or otherwise amend the terms of the solicitation, and that only a formal, written amendment to the solicitation is binding. A written record of the conference proceedings should be kept. This record of proceedings, including any new material provided at the conference and questions and answers addressed should be provided to all potential offerors, regardless of whether they attend the conference.

Where possible, written questions should be requested in advance, and answers should be prepared in advance and delivered during the conference. Questions answered during the conference should be included in the record of conference proceedings.

As soon as possible after the preproposal conference, the Contracting Officer should ensure that all potential offerors receive the written record of the conference proceedings, including any new material provided, and any questions and answers addressed. If any of the terms and conditions or requirements of the solicitation were changed, a formal solicitation amendment should be issued.

Additionally, a site tour should be part of any preproposal conference if there is a site to tour.

### **Alternatives or In Addition to a Preproposal Conference**

In addition to a preproposal conference, or in lieu thereof, the following approaches may also be used:

- Establish a reading room that contains public information regarding the requirement. A reading room is mandatory for any procurement. This can be accomplished either through a web-based electronic reading room, a walk-in reading room, or both.
- The Request for Proposal (RFP) should identify how questions regarding the RFP are to be submitted, and if a response to a question is appropriate, it should be conveyed to all potential offerors either by using the web, by letter, or by an amendment to the RFP when appropriate.
- One on one meetings can be held with potential offerors prior to submission of proposals with the express intent to receive feedback from potential offerors regarding the RFP. Based on these meetings, public information and exchanges

should be provided to all parties by using the web, by letter, or by an amendment to the RFP when appropriate. Note: Care must be taken during these one on one meetings to not provide information that might give a potential offeror an unfair competitive advantage.

**PART III SCORING METHODOLOGIES****Background**

The objective of an acquisition conducted under source selection procedures is to select the source or sources which represent the best value to the Government. FAR Part 15 discusses source selection processes and techniques, including tradeoff processes. The tradeoff process permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal. FAR 15.305 (a) Proposal Evaluation, states: "(a) Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and sub-factors specified in the solicitation. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file."

The Source Selection Authority (SSA) is required to follow the evaluation criteria and relative weighting factors set forth in the solicitation. How the SSA achieves this objective is not prescribed by the Regulations. In fact, the FAR specifically states that the rating method need not be disclosed in the solicitation. GAO has repeatedly held that Rating Plans are internal documents, and that offerors are not entitled to enforce the provisions of a Rating Plan that were not included in the solicitation. Beyond the implications in the FAR that a rating method will be used, there is no known regulatory requirement for creation of a Proposal Scoring or Rating Plan. In theory, an SSA could review the proposals, identify the strengths and weaknesses of the proposals and based on his/her judgment, following the evaluation factors and weightings in the solicitation, reach a selection decision. This approach is simply not practical and SSAs normally employ the use of an advisory board, team or panel to evaluate the proposals. Scoring/Rating Plans have evolved as the structured means of communicating the relative standings of each offeror to the SSA. In the end however, the SSA must base the selection decision on the strengths, deficiencies, and weaknesses of the proposals submitted - not merely on the score derived through use of a Proposal Scoring or Rating Plan.

A Proposal Scoring or Rating Plan helps evaluators assess a proposal's merit with respect to the evaluation factors and significant sub-factors in the solicitation. It uses a scale of words, colors, numbers, or other indicators to denote the degree to which proposals meet the standards for the non-cost evaluation factors. Some commonly used rating systems are adjectival, color coding, and numerical. What is key in using a rating system in proposal evaluations is not the method or combination of methods used, but rather the consistency with which the selected method is applied to all competing proposals and the adequacy of the narrative used to support the rating.

A traditional Scoring or Rating Plan is comprised of three basic elements: (1) evaluation factors and sub-factors set forth in the solicitation; (2) a rating system (e.g., adjectival, color coding, numerical, or ordinal); and (3) evaluation standards or descriptions which explain the basis for assignment of the various rating system grades/scores.

**Applicable statutes, procurement regulations, or small business regulations**

FAR 15.305 (Proposal Evaluation); FAR 15.505 (Preaward Debriefing of Offerors); and FAR 15.506 (Postaward Debriefing of Offerors)

**Issues/Questions**

- What should be considered when developing evaluation standards?
- What are the most common types of rating systems?
- What does a sample rating scale look like?
- Does an evaluation need to include the identification of strengths and weaknesses?

**Discussion Topics****What should be considered when developing evaluation standards?**

Evaluators must be able to determine the relative merit of each proposal with respect to the evaluation factors. Evaluation standards/descriptions provide guides to help evaluators measure how well a proposal addresses each evaluation factor and sub-factor identified in the solicitation. (Standards must not introduce unstated evaluation criterion.) Standards permit the evaluation of proposals against a uniform objective baseline rather than against each other. The use of evaluation standards minimizes bias that can result from an initial direct comparison of proposals. Standards also promote consistency in the evaluation by ensuring that the evaluators evaluate each proposal against the same baseline. In developing standards for each evaluation factor and sub-factor, you should consider the following:

- As you develop your evaluation factors, concurrently draft a standard for each factor and sub-factor.
- Define the standard by a narrative description that specifies a target performance level that the proposal must achieve in order to meet the standard for the factor or sub-factor consistent with the requirements of the solicitation.
- Describe guidelines for higher or lower ratings compared to the standard "target."
- Overly general standards should be avoided because they make consensus among evaluators more difficult to obtain and may obscure the differences between proposals. A standard should be worded so that mere inclusion of a topic in an offeror's proposal will not result in a determination that the proposal meets the standard.
- While it is sometimes easier to develop quantitative standards because of their definitive nature, qualitative standards are commonly used in source selections.

**What are the most common types of rating systems?****Common Rating Systems****Adjectival Ratings**

Adjectival ratings are a frequently used method of scoring or rating an offeror's proposal. Adjectives are used to indicate the degree to which the offeror's proposal has met the standard for each factor evaluated. Subsequent to, and consistent with, the narrative evaluation, an appropriate adjective rating may be given to each factor and sometimes to each significant sub-factor. Adjectival systems may be employed independently or in connection with other rating systems.

**Color Coding**

This system uses colors to indicate the degree to which the offeror's proposal has met the standard for each factor evaluated. For instance, the colors blue, green, yellow, amber, and red may indicate excellent, good, satisfactory, marginal, or unsatisfactory degrees of merit, respectively.

**Note:** It should be noted that while the adjectival and color coding systems may be the most difficult to use; they may be the most effective. The reason for the difficulty in use results from having to derive a consensus rating when, for example, one element is weighted at 50% with a Good (Green) rating and one element is weighted at 40% with a Excellent (Blue) rating. Under these systems, there is not a simple process to aid the evaluators to reach the consensus rating. The evaluators must assess the collective impact of evaluation sub-factors on each higher tier factor, and then assess the totality of the evaluation factors as they related to each other under the weighting methodology set forth in the solicitation. This complexity forces the evaluators to thoroughly understand the strengths and weaknesses of each individual proposal in relation to the evaluation criteria and standards in order to reach consensus. While it is critical that this understanding is reflected in the narrative of the evaluation, this depth of understanding aids in the writing of the competitive range and source evaluation report.

**Numerical**

This system assigns point scores (such as 0-10 or 0-100) to rate proposals. This rating system may appear to give more precise distinctions of merit; however, numerical systems can have drawbacks as their apparent precision may obscure the strengths and weaknesses that support the numbers. As opposed to the adjective and color coding systems, numeric systems can provide a false sense of mathematical precision which can be distorted depending upon the evaluation factors used and the standards therefore. For example, if a standard indicated there could be no weaknesses, a very minor weakness in a proposal would force assignment of the next lower level rating. This would potentially cause a significant mathematical difference in the proposals.

In any evaluation process, the source evaluation board should first identify the strengths and weaknesses involved with a proposal, and then assign the adjective, color or numeric ratings to the criteria. However, this is particularly important when using numeric system because it is too easy to fall into the trap of relying on the numeric rating as opposed to the actual merits or weaknesses of the proposal. Due to the potential pitfalls with the use of numeric ratings, some organizations do not permit the use of numerical rating systems.

It is strongly suggested that if a numerical system is used, the point system used should be a staggered numeric rating system (e.g., 1, 3, 5, 8 and 10) representing the various ratings and not use a full sequential scale (i.e., 0, 1, 2, 3 . . . 10) to represent the various ratings. If the sequential system is used, it forces the evaluation team to differentiate the rating of each evaluation factor within a range of points (e.g., a satisfactory element of a proposal must receive either 4, 5 or 6 rating points) as opposed to the assignment of a standard 5 point rating for a satisfactory rating. The sequential system also can result in generating overall proposal ratings which are numerically close in the total rating which may disguise the proposal differences. Moreover, using a 1-100 scale often results in using "public school" types of grading levels, even if the rating plan provides differently - that is, an A proposal gets a 90-100, a B proposal gets 80-89, a C proposal gets 70-79, and so on. This results in over half of the rating scale [59 and below] effectively not being used. In our experience, using a 1-100 rating scale usually results in ratings being clustered in the 85 to 90 range and blurs the real distinctions between proposals. It also makes the cost-technical tradeoff more difficult, where the technical difference amounts to just a few percentage points.

**What does a sample rating scale look like?**

The following is a sample of a rating scale that could be used to evaluate technical and management factors and significant sub-factors. A proposal need not have all of the characteristics of a rating category in order to receive that rating. The evaluators must use judgment to rate the proposal using one of the three systems: numeric, adjectives or colors.

## Examples

## Typical Ratings and Descriptors

Each rating must have a definition.

TECHNICAL MERIT ratings reflect the government's confidence in each offeror's ability, as demonstrated in its proposal, to perform the requirements stated in the RFP. Choose one method (e.g., numerical, adjectival, or color) to evaluate technical merit.

NUMERICAL	ADJECTIVAL	COLOR	DEFINITION/STANDARDS
10	Excellent	Blue	Proposal demonstrates excellent understanding of requirements and approach that significantly exceeds performance or capability standards. Has exceptional strengths that will significantly benefit the Government.
8	Good	Green	Proposal demonstrates good understanding of requirements and approach that exceeds performance or capability standards. Has one or more strengths that will benefit the Government.
5	Satisfactory	Yellow	Proposal demonstrates acceptable understanding of requirements and approach that meets performance or capability standards. Acceptable solution. Few or no strengths.
3	Marginal	Amber	Proposal demonstrates shallow understanding of requirements and approach that only marginally meets performance or capability standards necessary for minimal but acceptable contract performance.
0	Unsatisfactory	Red	Fails to meet performance or capability standards. Requirements can only be met with major changes to the proposal.

COST - NOT "RATED." Reflects the evaluated cost. RFP must describe method by which cost will be evaluated (e.g., how probable cost or life cycle cost will be evaluated.)

Alternate language for defining the Standards might be:

**Outstanding: An outstanding proposal is characterized as follows:**

The proposed approach indicates an exceptionally thorough and comprehensive understanding of the program goals, resources, schedules, and other aspects essential to performance of the program.

In terms of the specific factor (or significant sub-factor), the proposal contains major strengths, exceptional features, or innovations that should substantially benefit the program.

There are no weaknesses or deficiencies.

The risk of unsuccessful contract performance is extremely low.

**Good: A good proposal is characterized as follows:**

The proposed approach indicates a thorough understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.

The proposal has major strengths and/or minor strengths which indicate the proposed approach will benefit the program.

Weaknesses, if any, are minor and are more than offset by strengths.

Risk of unsuccessful performance is very low.

**Satisfactory: A satisfactory proposal is characterized as follows:**

The proposed approach indicates an adequate understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.

There are few, if any, exceptional features to benefit the program.

The risk of unsuccessful performance is low.

Weaknesses are generally offset by strengths.

**Marginal: A marginal proposal is characterized as follows:**

The proposed approach indicates a superficial or vague understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.

The proposal has weaknesses that are not offset by strengths.

The risk of unsuccessful contract performance is moderate.

**Unsatisfactory: An unsatisfactory proposal is characterized as follows:**

The proposed approach indicates a lack of understanding of the program goals and the methods, resources, schedules, and other aspects essential to the performance of the program.

Numerous weaknesses and deficiencies exist.

The risk of unsuccessful performance is high.

**Does an evaluation need to include the identification of strengths and weaknesses?**

**Strengths and Weaknesses**

Regardless of whether an adjectival, color, or numerical rating system is used, proposal evaluations must be supported with narrative statements which describe each strength and weakness associated with each aspect of a proposal in relation to the evaluation criteria. The identification of the specific strengths and weaknesses provides the SSA the information needed to make a reasonable and rational basis for the selection decision. The detailed information on strengths and weaknesses is also required by the contracting officials in order to provide the debriefings to unsuccessful offerors required by FAR 15.506(d), as well as contracting and legal



personnel in order to defend any protests which might be filed with the agency or the General Accounting Office.

**PART IV      CONTRACTING OFFICER ROLE AND ROLE OF COUNSEL IN  
THE ACQUISITION PROCESS****Background**

One important role of the contracting officer and counsel is to provide business, procurement and legal advice and guidance to the Source Selection Official and Source Evaluation Board Chair. Prior to the initiation of a procurement in a Federal Acquisition Regulations (FAR) Part 15 competitive procurement, the contracting officer and counsel should brief the source evaluation board or the technical evaluation committee (SEB/TEC) on the workings of the source selection process. The briefing should include an explanation of the evaluation process and pertinent documents, conflicts of interest, proposal security, and procurement integrity. The briefing should be designed to inform the evaluators of their responsibilities and provide guidance to the evaluators on how to review the proposals. If there are non-voting members on the SEB/TEC, the contracting officer should explain the limits of their involvement in the selection process. The contracting officer should also advise the SEB/TEC members of the planned schedule for the evaluations, including the time allotted for individual evaluations, consensus discussions, completion of a draft evaluation report, and the anticipated date for completion of the final report. If the solicitation included a requirement for oral presentations by the offerors, the contracting officer must explain the evaluation process for the oral presentations.

In any acquisition the contracting officer should involve the counsel to the greatest extent possible, and as early in the process as possible. The counsel should act as part of the team engaged in making this acquisition occur. At the latest, the counsel should be consulted while the Request for Proposals (RFP) is being drafted. By proceeding in this way, the contracting officer informs the counsel about the requirements of the acquisition, and anticipates problems which may arise in the award. Further, involving the counsel at the earliest part of the process so that he or she is fully informed regarding the program office's needs permits the counsel to suggest options available to accomplish those needs, which may result in changes to the RFP and model contract.

Time consuming activities associated with rework of the evaluation process can be avoided by taking the time for a thorough briefing prior to allowing the evaluators to open the proposals. The contracting officer leads the pre-evaluation briefing; however, the legal advisor to the SEB/TEC should attend and may take the lead for pieces of the briefing. For example, the contracting officer may ask the legal advisor to explain the procurement integrity or conflicts of interest provisions to the evaluators. Additionally, the counsel should be involved in reviewing solicitation strategy; reviewing the RFP (evaluation criteria, award criteria, applicable contract clauses) reviewing the rating plan; overseeing the evaluation; reviewing the competitive range determination (if any); overseeing the discussions (if any); and reviewing the selection, and the selection statement.

**Applicable statutes, procurement regulations, or small business regulations:**

FAR 3.104 (Procurement Integrity); FAR 15 (Contracting by Negotiation); DEAR 915 (Contracting by Negotiation); FAR Part 9.5 (Organizational and Consultant Conflicts of Interest); DEAR 909.5 (Organizational and Consultant Conflicts of Interest); DEAR 952.209-72 (Organizational Conflicts of Interest); DEAR 970.0905 (Organizational Conflicts of Interest); and DEAR 903.104-10 (Violations or Possible Violations)

**Issues/Questions**

- What aspects should the contracting officer brief the SEB/TEC prior to evaluation of proposals?
- What is the role of counsel in the procurement process?

**Discussion Topics**

What aspects should the contracting officer brief the SEB/TEC prior to evaluation of proposals?

Certification requirements for evaluators

The briefing is a good opportunity to make sure that all evaluators have signed the required certifications. Prior to commencing evaluations, evaluators are required to complete confidentiality certificates, conflict of interest certificates, or other certifications established in the rating plan.

Security of proposals

The proposals and any other proprietary or source selection information need to be kept in locked cabinets or locked rooms. The SEB/TEC chairman should arrange for appropriate facilities for safeguarding the proposals and other source selection information prior to the receipt of the proposals. Copies of proposals and proprietary/source selection information should be numbered and tracked by the SEB/TEC chairman or other clearly designated member of the evaluation board (for example, the contracting officer). The contracting officer should inform the evaluators that proposals shall not be taken home. The evaluation and contents of proposals shall not be discussed outside the SEB/TEC with the exception of ex-officio members, procurement advisors, legal advisors, and other selection officials.

Potential individual conflicts of interest

Individual conflicts of interest need to be resolved prior to commencing evaluation. The evaluators need to be reminded to review all contractors, subcontractors, consultants, and teaming arrangements proposed under the procurement and report any potential conflicts of interest to the contracting officer, legal advisor, and the SEB/TEC chairman. Evaluators need to report any relatives employed by the proposing entities, friendships, financial interests, pension benefits, and prior employment. The existence of these relationships does not necessarily mean that a conflict of interest exists, but legal counsel will review the specifics of the situation to determine if a potential conflict exists. The evaluator will then be informed if any actions need to be taken to avoid the conflict of interest. Actions that may be taken include divestment of stock, recusal from review of selected offerors, or removing the evaluator from the source evaluation process.

The evaluators need to be advised against the appearance of a conflict of interest. For example, evaluators should not have lunch or go golfing with offerors or prospective offerors, or engage in any other activity that could give the appearance of a conflict of interest. Evaluators should be encouraged to discuss any questions regarding the appearance of a conflict of interest with the contracting officer and legal advisor.

Procurement Integrity Act

The procurement integrity provisions of the Office of Federal Procurement Policy Act (OFPP Act) (41USC 423) (commonly referred to as the Procurement Integrity Act) address a variety of issues, but the two of most concern to evaluators are the prohibitions against employment discussions and the release of information regarding a procurement. The provisions of the Procurement Integrity Act are implemented in FAR Part 3.104. The contracting officer should inform the evaluators that civil and criminal penalties, and administrative remedies, may apply to conduct that violates the Procurement Integrity Act and related statutes and regulations. The procurement integrity piece of the briefing to evaluators can either be provided by the contracting officer or the legal advisor to the SEB/TEC.

Employment prohibitions

Evaluators should be instructed to consult with the legal advisor and the legal staff of the agency ethics office regarding any contact with an offeror regarding non-Federal employment as well as questions related to post employment restrictions. In general, evaluators need to be informed that they can't be involved in the source selection process and discuss potential employment with any offerors, including subcontractors and consultants, proposing under the solicitation. This includes submitting resumes to firms. Evaluators need to be told that if they are approached by a firm, they can't leave the door open for employment discussions and tell the firm that conversations about employment will resume after the evaluation is completed.

In fact, the FAR requires that if an agency official is contacted by a person who is an offeror under the solicitation that official must report that contact, in writing, to the official's supervisor and the agency ethics official. The FAR further states that the agency official must either reject

the offer of employment or disqualify himself/herself from further participation in that procurement.

Evaluators should be advised that participation in a Federal agency procurement will result in some post-employment restrictions. Post-employment restrictions are covered by 18 U.S.C. 207 and 5 CFR Parts 2637 and 2641 and Subsection 27(d) of the OFPP Act and FAR 3.104-3(d). Former Government employees are prohibited from engaging in certain activities, including representation of a contractor before the Government in relation to any contract or other particular matter involving specific activities in which the former employee participated personally or substantially while employed by the Government. Evaluators who have concerns about the post-employment restrictions should be instructed to discuss their situation with the legal staff within the agency responsible for interpreting post-employment restrictions prior to commencing evaluation of the proposals or becoming further involved with the procurement.

### **Disclosure of proprietary or source selection information**

The second area of concern to evaluators is the disclosure of any proprietary or source selection information during the conduct of a procurement. The Procurement Integrity Act prohibits the disclosure of contractor bid or proposal information or source selection information prior to the award of a Federal contract. Evaluators should be informed that source selection information includes: 1) proposed costs or prices; 2) source selection plans; 3) technical evaluation plans; 4) technical evaluation of proposals; 5) cost or price evaluation of proposals; 6) competitive range determinations; 7) ranking of bids, proposals, or competitors; 8) reports and evaluations of source selection panels, boards, or advisory counsel; and 9) any other information marked source selection.

Evaluators should be reminded that they can only discuss contractor bid or proposal information or source selection information with individuals who are authorized, in accordance with applicable agency regulations or procedures, to receive such information. It is useful for evaluators to keep in mind what is public information and what is not. For example, information in the solicitation is public, but the rating plan is not. The weights assigned to the evaluation criteria are not public unless they are identified in the solicitation. Once a competitive range is established, even though the Government has written letters to offerors letting them know whether or not they are in the competitive range, that is not public information. Evaluators should be cautioned against holding any conversations with or answering any questions from offerors. All questions should be referred to the contracting officer.

If a potential violation of the Procurement Integrity Act is reported, the contracting officer is required to determine if there is any impact on the pending award or selection of the contractor.

FAR Part 3.104-7 identifies the procedures the contracting officer and agency are required to follow. Evaluators should be advised that the earlier a potential procurement integrity violation is reported, the greater is the contracting officer's ability to mitigate its effect on the procurement. For example, the contracting officer may be able to mitigate an unauthorized disclosure of information by making that information available to all offerors or by taking other appropriate action. Additionally, evaluators should be advised that if they are asked to prepare information

related to solicitation or the evaluation that they cannot re-delegate the action to a contractor, even if the action appears to be clerical.

It is helpful to provide examples of procurement integrity violations in the briefing so that the evaluators can relate the procurement/legal jargon to real situations they may encounter. For example, in one case a SEB/TEC evaluator allegedly communicated to an offeror in the competitive range, in general terms, how it needed to revise its technical and price proposals in order to receive an award. The potential violation was reported by the offeror and the case was referred to the appropriate criminal investigative organization for further investigation. As another example, a senior level program official asked a support service contractor to assist in developing the statement of work and required labor mix for the re-compete of its own contract. After the violation was reported, the program official attempted to argue that the documents prepared by the support service contractor were only an outline and the information was significantly modified prior to release of the solicitation. This argument was not found to be convincing by the investigative organization.

### **Evaluation process**

The contracting officer should provide an overview of the evaluation process and the steps to be followed. The evaluators should be instructed to review the pertinent documents prior to evaluating the proposals. Evaluators should review and become familiar with the source selection plan/rating plan, statement of work, evaluation scoring sheets, the evaluation criteria in sections L and M of the solicitation, and the established weights for each criterion and sub-criterion.

The proposals need to be individually evaluated by each SEB/TEC member. Evaluations shall be based on the evaluation criteria in the solicitation, and evaluators need to be cautioned against deviating from the evaluation criteria or substituting evaluation criteria.

The contracting officer should discuss the unique aspects of the past performance criteria, and how evaluation of past performance differs from the other criteria. Evaluation under this criterion relies on information provided by the offeror's previous customers.

Evaluators shall be instructed to develop strengths and weaknesses for each criteria that are sufficiently detailed to support the assigned score or adjectival rating. This does not mean that evaluators will assign individual scores or ratings. This depends on the evaluation process established in the source selection plan/rating plan.

Commonly, individual evaluators develop individual strengths and weaknesses, and then the SEB/TEC meets to develop consensus strengths and weaknesses prior to assigning scores. This is the preferred method at the Department of Energy. Evaluators should also be encouraged to use the full range of adjectival ratings or scores.

Evaluators must be cautioned not to compare proposals against each other. Proposals shall be evaluated against the criteria and standards established in the solicitation. FAR Part 15

specifically states that competitive proposals shall be evaluated solely on the factors and sub-factors identified in the solicitation. Evaluators should be instructed that if the information sought does not exist where it is expected, that they should check if it exists elsewhere, such as in the introduction, on a diagram, or in the appendices.

The briefing should advise evaluators to be consistent during the evaluations, scoring, and developing of questions. The contracting officer should instruct the evaluators to discuss questionable issues as a group. Evaluators should be instructed to only credit or fault an offeror once for the same fact or idea unless the solicitation has a redundancy in the criteria. Similarly, evaluators need to evaluate the same fact or idea consistently. If something is noted as a weakness under one proposal, it must be designated as a weakness in other proposals with the same fact or idea.

#### SEB/TEC report and documentation of evaluation

FAR Part 15 states that the source selection records must include "a summary, matrix, or quantitative ranking, along with appropriate supporting narrative, of each technical proposal using the evaluation factors." The consensus strengths and weaknesses by criterion are included in the SEB/TEC report. The contracting officer should advise the SEB/TEC that the report needs to be complete, accurate, and contain sufficient detail on strengths, weaknesses, deficiencies, and risks to demonstrate to an outside reviewer that the Government's evaluation was fair, reasonable, and unbiased. The evaluators should be informed that the reports prepared by the SEB/TEC must be clear, convincing and supportable, and may be reviewed by the General Accounting Office or a judge during a protest. Some contracting officers encourage evaluators to reference the pertinent part of the applicable evaluation criteria and the applicable page of the offeror's proposal for each strength or weakness. Evaluators should be told to avoid generalizations of a proposal's merits or problems, and instead state the facts that support the conclusions.

The contracting officer must instruct the evaluators to refrain from making personal notes in the proposals and on other documents that are retained. These documents may become part of the source selection record, and personal notes may be used during a protest to show inconsistencies. Evaluators must be advised to stamp all documents and worksheets with "Source Selection Information - See FAR 2.101 and 3.104."

#### **What is the role of counsel in the procurement process?**

##### **Counsel Advisory Role**

In some applicable cases, the Assistant General Counsel for Procurement and Financial Assistance, GC-61 acts by advising the Office of Contract Management, ME-62 in relation to all the above actions when the acquisition has been selected for headquarters review. In those cases, GC-61 advises ME-62, in addition to the advice given to the SEB/TEC and Source Selection Official by the applicable field attorney. In this situation, each attorney has a different client: the field attorney advises the SEB/TEC, and the Headquarters attorney advises ME-62. In most

cases, the advice is similar. Nothing prohibits field personnel from consulting the office of the Assistant General Counsel for Procurement and Financial Assistance at any time, but that office generally prefers that field personnel consult with the field counsel in the first instance, and that field consult contact GC-61 when necessary. Furthermore, both the field attorney and GC-61 are involved if there is a protest of any sort.



**PART V PAST PERFORMANCE AS AN EVALUATION FACTOR****Background**

The use of past performance as an evaluation factor adds a new aspect to the evaluation process. As required by FAR 9.1, past performance was generally examined only in the context of a determination of responsibility. Contractors with a history of unsatisfactory performance were considered not responsible contractors. This type of determination generally involved a minimum of paperwork and time. Formal documentation is required only if the contractor is found to be not responsible.

Now past performance must also be examined through a comparative assessment during the evaluation process. The examination is of information regarding a contractor's actions and performance under previously awarded contracts. It is a review of deeds not words. The currency and relevance of information, source of the information, context of the data, and general trends in contractor's performance shall be considered. This assessment is compared with the assessment of the past performance of the competing contractors to help determine which contractor is offering the best value.

Key to the successful use of past performance - and any factor- in the source selection process is the establishment of a clear relationship between the statement of work (SOW), Section L (instructions to offerors), and Section M (evaluation criteria). The factors chosen for evaluation must track back to the requirements in the SOW. They should be reasonable, logical, and coherent.

The use of past performance as an evaluation factor potentially increases the workload and paperwork related to the evaluation effort. The problem is that evaluating past performance requires gathering and evaluating additional information - information not found in proposals. The evaluation of past performance requires making inquiries of third parties about contractor performance on other contracts and evaluating the responses.

Use of past performance as an evaluation factor is mandatory unless the contracting officer documents in the contract file why the evaluation of past performance is not appropriate. It is up to the contracting officer to document the reason that the use of past performance as an evaluation factor is inappropriate.

Using past performance as an evaluation factor depends on the significance of past performance as a discriminator. The purpose of an evaluation factor is to enhance the evaluator's ability to distinguish one proposal from another in terms of its relative worth or value to the government. An evaluation factor that does not help discriminate between proposals should not be used as an evaluation factor.

**Applicable statutes, procurement regulations, or small business regulations**

FAR 8.404 (b) ( Using Schedules); FAR 15.101-2 (b) (Lowest Price Technically Acceptable Source Selection Process); FAR 15.102 (c) (Oral Presentations); FAR 15.202 (a) (Advisory Multi-Step Process); FAR 15.304 (Evaluation factors and significant sub-factors); FAR 15.305 (Proposal evaluation); FAR 15.306 (Exchanges with offeror after receipt of proposals); FAR 16.505 (b) (Order under multiple award contract; and FAR 42.15 (Contractor Performance Information)

**Issues/Questions**

- What past performance information should be requested?
- How should the solicitation aspects regarding past performance be structured?
- How much past performance information should be requested?
- How much weight should be placed on past performance information?
- When and what information can be discussed with offerors regarding past performance?

**Discussion Topics**

**What past performance information should be requested?**

Information requested under section L should be focused on contracts for similar efforts that have been awarded and in place for at least three months. Similar efforts should be defined by the size, scope, complexity, contract type, etc...

Information concerning past performance by subcontractors should not be requested unless they are a major subcontractor.

It is important to ask for at least two references on each contract. In addition to ensuring that all aspects of the contractor's performance will be discussed, it also ensures that the anonymity of the references can be maintained. FAR 15.306(e)(4) prohibits release of the names of individuals providing reference information about an offeror's past performance.

**How should the solicitation aspects regarding past performance be structured?**

The solicitation should explain that past performance information that is not similar will be considered when a contractor has no past performance information from contracts for similar efforts.

Information from previously established companies and the key personnel from which newly formed companies and mergers are formed should be used to mitigate the newly formed company and merger not having past performance information. Additionally, if there is no Federal contract information, past performance information should be reviewed from other

sources such as state and local government contracts and private sector contracts and subcontracts.

The RFP section M should identify if the information requested to mitigate a company not having relevant past performance information will be rated lower than relevant past performance information.

The RFP section M should indicate that newly formed companies, which cannot mitigate having no past performance information, shall not be given a rating of favorable or unfavorable. What constitutes a not being given a rating of favorable or unfavorable should be included in the rating plan.

The RFP section M should state that, if the government's attempts at gathering and verifying the offerors referenced past performance information fails, and the offeror has been notified and not been able to correct this problem, the offeror will be not be given a rating of favorable or unfavorable.

The RFP section M must stipulate the relative importance of past performance information.

If corporate experience and past performance are separate evaluation criteria do not ask for the same information under each of these criteria, in order to avoid the potential for double counting the same information. Do not confuse evaluation of past experience with evaluation of past performance.

Make certain that section L explains that offerors shall be defined as business arrangements, and each firm in the business relationship (i.e., joint venture, teaming partners, and major subcontractors) will be evaluated on its past performance.

Section L should include a statement that the government may use past performance information obtained from other than the sources identified by the offeror and that the information obtained will be used for both the responsibility determination and the best value decision.

Since past performance evaluation is essentially an informed judgmental decision of the government, in order for the government's decision to withstand scrutiny, the contract file should contain detailed documentation identifying that the past performance information has been appropriately analyzed and verified by the government.

Attempts at gathering and verifying information from the references on how the contractor performed is the responsibility of the government. Questionnaires followed up by telephone interviews have the most success in getting useful and timely responses from references.

Questionnaires that will be forwarded to reference checks should be provided in the RFP for informational purposes only. This allows offerors to know what is important to the government on this contract and helps offerors in their proposal decisions. The questionnaire should be listed as an attachment in Section J, and Section L should note that it will be used to collect past

performance information. The questionnaire should be short. No more than a page to a page and a half of questions should be asked.

Information that supports an entity's past performance, such as awards of excellence presented to the companies that will be performing the work, should be requested.

Avoid formula driven past performance decisions, as past performance is essentially a subjective best value decision.

#### **How much past performance information should be requested?**

Be prudent about the amount of past performance information that is requested. It should be a reasonable amount that does not cause excessive burdens for the contractor and the government. Additionally, FAR 42.1503(e) states that past performance information shall not be retained to provide source selection information for longer than three years after completion of the contract. Therefore, the information requested should not go beyond three years past completion of the contract.

#### **How much weight should be placed on past performance information?**

It is recommended that under the evaluation criteria of the RFP, past performance should be given a weighting of 25% or be equal to the most heavily weighted non-cost evaluation factors. However, if knowledge and information about the market place reveal that there is strong reason to believe that there are only a few capable offerors, there is substantially no discrimination among these potential offerors' past performance, the Source Selection Board should consider assigning a lesser weight for past performance. This type of situation is more likely to occur under requirements for complex scientific efforts.

Contractor successful performance of relevant past performance information should be rated higher than a contractor that has no past performance information.

For administrative requirements and the less complex scientific requirements, where there tends to be a greater market of capable offerors, past performance should be a very significant factor in the evaluation criterion.

Contracting activities should not downgrade a contractor for filing protests or claims or not agreeing to use alternative dispute resolution (ADR) techniques. Conversely, contracting activities should not rate a contractor positively for not having filed protests or not having made claims or agreeing to use ADR techniques. However, the quality of a contractor's performance that gave rise to the protest or claim may be considered. In other words, while performance must be considered, a contractor exercising its rights may not.

#### **When and what information can be discussed with offerors regarding past performance?**

Past performance information is proprietary source selection information. Therefore, section L should explain that the government will only discuss past performance information directly with

the prospective prime or sub-contractor that is being reviewed. If there is a problem with the past performance entities that have formed business arrangements with the prime contractor, such as subcontractors, joint ventures, and teaming partners, the prime contractor can only be informed that there is a problem with the entity under review. The details of the problem cannot be provided, unless the affected entity agrees.

The offeror should be asked to discuss any major problems encountered on the contracts listed and the corrective actions taken to resolve them.

If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond).

The questions asked of the past performance points of contract should be the same. Inconsistency in questions can lead to the potential issue of unequal evaluation of offerors. However, if there is a concern raised based on the responses to questions, then it may be necessary to hold discussions to resolve the matter.

**PART VI ORAL PRESENTATIONS****Background**

This topic is a digest of the 1996 Office of Federal Procurement Policy Guidelines For The Use Of Oral Presentations. This digest provides the most salient aspects of these Guidelines.

The use of oral presentations is a technique which provides offerors with an opportunity to present information through verbal means as a substitute for information traditionally provided in written form under the cover of the offeror's proposal. Oral presentations can be used as a substitute for written proposals or can be used to augment written proposals and may occur at any time during the acquisition process. Oral presentations are subject to the same restrictions as written information, regarding timing FAR 15.208 and content FAR 15.306. Its major use has been to permit evaluators to receive information as to the capability of the offeror - generally demonstrating its understanding of the work or describing how the work will be performed - directly from the key members of the offeror's team that will actually perform the work. In a number of cases, the evaluators have conducted the oral presentation in the form of an interview, probing for additional information, posing sample tasks or using other techniques to test the ability of the offeror's team.

Certain types of written proposal information, particularly in the technical and management areas, are costly to prepare and time consuming to evaluate. In addition, oral presentations avoid the use of lengthy written marketing pitches and essays. The use of oral presentations allows for greater communication between the government personnel and the offerors' key personnel and often can be used as essentially a "job interview" of the proposed key personnel. Using oral presentations can have the effect of greatly reducing procurement acquisition lead time and costs associated with the source selection process. These advantages are realized by both government and industry.

A list of the advantages is as follows:

- Can save significant procurement lead time;
- Can improve communication and the exchange of information between government and offerors;
- Can reduce government costs;
- Can reduce offerors' costs and increase competition;
- Can make customers feel more involved in contract selection and award; and,
- Can improve ability to select the most advantageous offer.

There is not one best approach for using oral presentations. There are variations in the approach for oral presentations to be considered by the acquisition team when developing the oral presentation methodology. The acquisition team should consider the following when developing the oral presentation methodology:

- media used to record the presentation;
- restrictions on the extent and nature of material used in the presentation;
- the Government participants; the offeror's presentation team; and,
- the amount of time permitted for the presentation.

Additional concerns to be considered are as follows:

- The influence of presentation mannerisms, as distinguished from technical content, on the evaluators' decisions;
- The failure to allow an effective exchange between evaluators and presenters; and
- In some cases, the redundant effort involved in preparing the same material for both oral and written formats.

#### **Applicable statutes, procurement regulations, or small business regulations**

FAR 15.102 (Oral Presentations); FAR 15.208 (Submission, Modification, Revision and Withdrawal of Proposals); FAR 15.306 (Exchanges With Offerors After Receipt of Proposals); FAR 15.307 (Proposal Revisions); and the Office of Federal Procurement Policy Guide For The Use Of Oral Presentations.

#### **Issues/Questions**

- What instructions should be provided regarding oral presentations?
- How should oral presentations be prepared for?
- How should the oral presentations be handled?
- How should oral presentations be evaluated?

#### **Discussion Topics**

**What instructions should be provided regarding oral presentations?**

#### **Proposal Preparation Instructions**

The instructions governing the oral presentation should encourage the offeror to not develop overly elaborate presentations or presentation material. The instructions for oral presentation should include the following:

- Description of the topics that the offeror must address and the technical and management factors that must be covered;

- Statement concerning the total amount of time that will be available to make the presentation;
- Description of limitations on Government-offeror interaction during, and, if possible after, the presentation;
- Statement whether the presentation will constitute discussions as defined in FAR 15.306(d);
- Statement whether the presentation will encompass price or cost and fee;
- Description and characteristics of the presentation site;
- Rules governing the use of presentation media;
- The anticipated number and types of positions of the Government attendees;
- Description of the format and content of presentation documentation, and their delivery; and
- Statement whether the presentation will be recorded (e.g., videotaped).

The solicitation should require that, as part of the presentation, the offeror will provide a listing of names and position titles of all presenters and copies of all slides and other briefing materials that will actually be used in the presentation. It is preferable that such materials be provided to the evaluation team prior to the presentation to permit the evaluators to familiarize themselves with the information. Materials referenced in a presentation, but not an actual part of the presentation, must not be accepted, or used in, evaluations.

### **How should oral presentations be prepared for?**

#### **Initial Preparation**

The order of presenters must be determined. A lottery is most often used to determine the sequence of presentations by offerors. The time between the first and the last presentation should be as short as practicable to minimize any advantage to the later presenters. In addition, oral presentations should be scheduled as soon as practicable after receipt of proposals.

The facility in which the presentation is to occur must be determined. In most cases the facility is one selected and controlled by the buying activity. However, nothing would preclude an oral presentation being given at an offeror's facility.

The selection of a facility can be reduced to the following:

- Make it comfortable for both the presenters and the Government evaluators. The room should be large enough to accommodate all of the participants, the recording equipment, lighting, audio-visual aids, and furniture.
- Make it accessible.
- Make it available, if possible, for inspection by the offerors prior to the time set for the actual presentation.



The solicitation should, to the extent practicable, describe the physical characteristics of the facility and resources available to the offeror. In addition, the solicitation should be clear as to what types of equipment will be available to the offeror for use in the presentation, what equipment, if any, should be provided by the offeror, and any prohibitions regarding equipment types and uses.

Prior to the presentation, the Contracting Officer should review the ground rules of the presentation session with the offeror. Additional matters for discussion include any restrictions on Government-offeror communications, information disclosure rules, documentation requirements, and housekeeping items.

Also, prior to the commencement of the presentation, the contracting officer should remind the Government participants of their responsibilities during and following the presentation. They should be advised that an oral presentation is procurement sensitive and that they may not discuss, within or outside the agency, (except among themselves) anything that occurred or was said at a presentation.

As a general rule, all of the Government evaluators should be present at every presentation. The Contracting Officer must attend and should chair every presentation. In a GAO case the offeror protested that the agency erred in not having the Source Selection Official (SSO) attend the presentation. The GAO stated that they are unaware of any requirement that an SSO attend presentation sessions.

Presentations by the offeror should to be made in person since, through the use of video conferencing a measure of government control of the meeting may be diminished. Accordingly, the submission of video tapes or other forms of media should not be authorized and should be rejected.

In addition, it is strongly recommended that the presenters should be the actual key personnel who will perform or personally direct the work being described, such as project managers, task leaders, and other in-house staff.

There are two tools available to manage the time each offeror is allotted for the oral presentation. First, and most obvious, is the imposition of a firm time limit. Firm time limits for the presentation must be established in the RFP, and each offeror must be allotted the same amount of time. Second, time may be controlled by restricting the amount of presentation material that an offeror may use during the presentation. Agencies used a combination of both a firm time limit and restrictions on information to control the time. There is no single or ideal amount of time to be allotted. The general rule of using the complexity of the procurement requirement to determine the time needed for the oral presentation may not be a reliable indicator. Another factor to consider when determining the proper amount of time is the effect on both the presenters and the evaluation team. The longer the presentation goes on the harder it is on both parties to stay focused on the presentation. Furthermore, by limiting the amount of time available for the presentation, sales pitches and theatrics can be minimized. The length of time spent on each part of the presentation should be left to the offeror's discretion. It is not generally advisable

to limit the time of individual topics or sections within the presentation; that can be the responsibility of the presenter.

### **How should the oral presentation be handled?**

#### **The Presentation**

One of the more problematic areas of the oral presentation approach is the nature and extent of communications between the offeror and the Government evaluation team. This is largely due to the strict rules established in regulation regarding communications with offerors during the course of the solicitation process.

The term "oral presentation" is not synonymous with "oral discussions" as defined in Section 15.306 of the Federal Acquisition Regulation. Oral discussions, as envisioned by the FAR, generally consist of verbal communications between the Government and an offeror that provides an opportunity for an offeror to explain, supplement, or enhance written material previously provided to address evaluated deficiencies and significant weaknesses in the proposal, with the end objective being the submission of a revised proposal by the offeror. The FAR prescribes strict controls (see FAR 15.306, 15.306(d), and 15.307) over when, where, and to what extent, the Government can communicate with an offeror regarding its proposal.

This is done in order to ensure fairness in the evaluation process. The result is a very rigid and somewhat unnatural communication process. As such, oral presentations, by their very nature can become problematic because of the concern about inadvertently triggering the rules regarding discussions. As stated earlier, restrictions on communications between the Government and the offeror should be addressed by the Contracting Officer to all parties prior to the commencement of the presentation.

Another significant area of concern is the record of the oral presentation. FAR 15.102(e) states that the Contracting Officer shall maintain a record concerning what the government relied upon to make a source selection decision. The method and level of detail is up to the agency and must be communicated to the offerors prior to commencement of the oral presentation. Some examples of records include videotaping, audio tape recording, a written record, Government notes, and copies of briefing slides or presentation notes. A caution on the use of video- and audio-taping is needed. Since the tape will become part of the official record, it may be available to the public under the Freedom of Information Act. Like a written proposal, the tape must undergo review by both the Government and the offeror whose presentation is being requested, and a redacted version of the tape must be generated. Because of the tape media, this can be both difficult and time consuming.

In a GAO case, a protestor claimed that the presentation/discussion sessions had not been recorded. In this case, the contemporaneous record consists of handwritten notes taken by the agency. The offeror did not provide the agency with any presentation materials during its presentation. The GAO ruled that given that "government notes" are specifically mentioned in FAR 15.102(e) as a permissible method of maintaining a record of oral presentations, and given

the lack of any prejudicial disagreement between the parties as to what was said during the presentation, the protestors complaint provides no basis to challenge the award.

**How should the oral presentation be evaluated?**

**Evaluation**

There is no firm rule regarding the most appropriate time to evaluate the presentation. Some agencies have elected to perform the evaluation immediately upon conclusion of each presentation. Other agencies have performed the evaluations of presentations after all of the presentations have been made. If practicable, it is recommended to score the oral presentations immediately after each presentation is made. If the latter approach is chosen, it is recommended that the evaluators should caucus following each presentation to exchange reactions, summarize potential strengths and weaknesses, and verify perceptions and understandings.

**PART VII****CLARIFICATIONS VERSUS COMMUNICATIONS****Background**

Clarifications and Communications are defined in the Federal Acquisition Regulation (FAR) as follows:

**Clarifications** are limited exchanges between the Government and offerors that may occur when award without discussions is contemplated (see FAR 15.306 (a)).

**Communications** are exchanges between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range (see FAR 15.306 (b)).

**Discussions** are negotiations conducted in a competitive acquisition, that take place after establishment of the competitive range (see FAR 15.306(d)).

The difference between what constitutes discussion or clarification has been a prominent problem within government contracting activities. A discussion between the Contracting Officer (CO) and an offeror obligates the CO to conduct discussions with all offerors in the competitive range, however, a request for clarification does not. When a CO communicates with some but not all offerors in the competitive range, other offerors may allege that they have been improperly excluded from discussions and thereby denied an equal opportunity to compete and may protest the source selection.

The CO may enter into communications with offerors who may or may not be included in the competitive range and not be obligated to communicate with the other offerors. The exchange may include critical information pertaining to the acceptability of the proposal or past performance concerns.

The objective of exchanges, including clarifications and communications, is to allow the Government to meet its needs in the most effective, economical and timely manner. However, there are limitations as to how this can be accomplished. Prior to the Clinger-Cohen Act, there were prohibitions on technical leveling and auctioning that have been removed from the FAR. However, there are new prohibitions in FAR 15.306 (e) specifically forbidding: (1) favoring one offeror over another; (2) revealing an offeror's technical solution including unique technology, innovative and unique uses of commercial items, or any other information that would compromise an offeror's intellectual property; (3) revealing the names of individuals proving past performance information, knowingly furnishing source selection information; or (5) revealing an offeror's price without permission. However, the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion. It is also permissible, at the Government's discretion, to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable.

Another important limitation during pre-competitive range exchanges of information is that clarifications and communication shall not provide an opportunity for proposal revisions. If this happens, all other offerors must also be allowed to revise their proposals. This can become especially complicated during oral presentations since an important goal of oral presentations is to provide an opportunity for dialogue among the parties. Since oral proposals generally include a session of questions and answers, care must be taken that the questions asked and the answers received do not modify the oral proposal presented. The CO must anticipate problems, take care to treat all offerors equally and keep records of all such communications.

Clarifications are used to enable the Contracting Officer to clarify certain aspects of proposals in order to proceed to award without discussions. Communications are used to clarify areas of ambiguity in order to determine whether the affected proposal should be included in the competitive range.

### **Applicable statutes, procurement regulations, or small business regulations**

FAR 15.306 (Exchanges with Offerors after Receipt of Proposals); and FAR 52.215-1 (Instructions to Offerors--Competitive Acquisition)

### **Issues/Questions**

- What should clarifications include?
- What should communications be used to accomplish?
- What are the limitations on pre-competitive range communications?
- How are clarifications and communications appropriately used?

### **Discussion Topics**

#### **What should clarifications include?**

1. To learn the relevance of past performance information
2. To respond to adverse past performance information if the offeror has not previously had that opportunity
3. To resolve minor or clerical errors such as
  - Obvious misplacement of decimal point in proposed price or cost information
  - Obviously incorrect prompt payment discount
  - Obvious reversal of price f.o.b. destination and f.o.b. origin or
  - Obvious error in designation of the product unit
4. Resolve issues of offeror responsibility or acceptability of the proposal as submitted.

The key word in applying clarifications is "limited" communication. Clarifications are permitted to give the offeror an opportunity to make clear and obvious key points about the proposal as originally submitted. The offeror may not revise, expand (by adding new information that enhances the proposal), or amplify its proposal. The intent of clarifications is to remove obvious ambiguity, not to permit the offeror to improve its position by drawing inferences from the Government's questions/information gathering exchanges and using those inferences to shade the meaning of the original proposal so that it becomes more attractive and more beneficial to the Government.

Of course, any opportunity for revision or enhancement must be made available to all offerors with proposals deemed acceptable for inclusion in a competitive range.

Communications are exchanges between the Government and offerors after receipt of proposals with the purpose of establishing a competitive range. Communications are authorized only when the offeror is not clearly in or clearly out of the competitive range. In other words, communications are used to determine whether an offer has a reasonable chance for award, i.e., should be included in the competitive range.

Specifically, communications:

- must be held with offerors whose past performance information is the determining factor that would prevent them from being in the competitive range. Adverse past performance must be addressed if the offeror has not had a prior opportunity to respond
- may be held with other offerors whose exclusion from or inclusion in the competitive range is uncertain.

**What should communications be used to accomplish?**

- Enhance the Government's understanding of the proposal (again, in order to determine whether to include the proposal in the competitive range):
- May address ambiguities of concern in the proposal (perceived deficiencies, weaknesses, errors, obvious omissions or mistakes)
- May address information relating to relevant experience
- Allow reasonable interpretation of the proposal (but not to enhance or revise it)
- Facilitate the Government's evaluation process

As stated previously, neither clarifications nor communications are permitted to be discussions in the pre-competitive range phase. Once a competitive range has been established, communications will be expanded to include discussions and may also include additional clarifications.

**What are the limitations on pre-competitive range communications?**

- Cure proposal defects or material omissions.

- Materially alter the technical or cost elements or the proposal .
- Otherwise revise the proposal.

Should any of the above circumstances occur, discussions have ensued. The Contracting Officer must then hold the same level of discussions with all offerors. For all practical purposes, the Contracting Officer has then established a competitive range that consists of all offerors. This could lead to holding discussions with offerors that do not have acceptable proposals and most probably would not be included in the competitive range. Accordingly, it is important not to let pre-competitive range communications stray into discussions.

**How are clarifications and communications appropriately used?**

Clarifications and communications are effective tools when used appropriately and well documented. They allow some limited exchanges with offerors to facilitate the Government's decisions concerning award without discussions or inclusion in the competitive range. Invocation of either clarifications or communications with one offeror does not require exchanges with all offerors - if they are handled correctly and documented carefully.

Care needs to be taken by the Contracting Officer to ensure that the exchanges are within the limits defined in FAR 15.306 (a) and (b) and that no offeror is allowed to revise its proposal as the result of these types of exchanges.

As with all elements of the source selection/negotiation process, clarifications and communications must be carefully documented by the Contracting Officer to insure that there is no appearance that one offeror is favored over another. The nature and extent of the exchanges needs to be set out clearly for the record.

**PART VIII COST OR PRICE ANALYSIS****Background**

Probable cost to the Government is a mandatory evaluation factor, FAR 15.404-1(d). Thus, this element must be evaluated in all procurements. There are two aspects of this evaluation. First, the contracting officer must ensure that the contract price, or cost and fee, is fair and reasonable. Second, in cost-reimbursement contracts the contracting officer must determine the probable cost of performance and use that cost in the selection process. The contracting officer shall use cost or price analysis to evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the work. The contracting officer shall document the cost or price evaluation.

The term "cost or pricing data" means all facts that, as of the date of agreement on the price of a contract, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

**Applicable statutes, procurement regulations, or small business regulations**

FAR 15.401 (Definitions); FAR 15.403 (Obtaining Cost or Pricing Data); FAR 15.404-1 (Proposal Analysis Techniques); and FAR 31.201-4 (Determine Allocability)

**Issues/Questions**

- What is price analysis and when should it be performed?
- What is cost analysis and when should it be performed?

**Preferred Approaches****What is price analysis and when should it be performed?****Price Analysis**

The contracting officer is required to make a price analysis on every procurement to ensure that the overall price to be included in the contract is fair and reasonable.

In the competitive negotiation process, price analysis is the preferred technique for determining price reasonableness because it permits the contracting officer to make the determination without a detailed analysis of the cost and profit elements of each proposal using cost analysis techniques.

Price analysis is generally based on data obtained from sources other than the prospective contractor. This data is gathered by the Government negotiating team from as many sources as



possible. Generally, to assure that the price being included in the contract is reasonable, a sound price analysis will be based on several different types of data.

The contracting officer is responsible for selecting and using whatever price analysis techniques will ensure a fair and reasonable price. One or more of the following techniques may be used to perform price analysis.

Comparison of proposed prices received in response to the solicitation. In this case competition is relied on to ensure that the costs are fair and reasonable.

Comparison of previously proposed prices and previous Government and commercial contract prices with current proposed prices for the same or similar items, if both the validity and the reasonableness of the previous prices can be established. A determination must be made that ensures that the price that is being compared to the proposed price has been determined to be fair and reasonable, either through presence of adequate price competition or some other manner such as cost or price analysis.

Use of parametric estimating. This analysis tool is used to identify inconsistencies in pricing that require further review. It is a technique used to estimate a particular cost or price by using an established relationship with an independent variable. Steps to follow when using this technique are:

- Define the dependent variable (e.g. cost dollars, hours, and so forth.)
- Select the independent variable to be tested for developing estimates of the dependent variable.
- Collect data concerning the relationship between the dependent and independent variables.
- Explore the relationship between the dependent and independent variables.
- Select the relationship that best predicts the dependent variable.
- Document your findings.

Comparison between competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements.

Comparison of proposed prices with independent Government cost estimates.

Analysis of pricing information provided by the offeror. Sufficient information must be obtained to determine the reasonableness of the proposed price. When there is insufficient information available from other sources, information must be requested from the contractor that is sufficient to determine a fair and reasonable price. Care must be taken to ensure that you request only the required information and not certified cost and pricing.

**What is cost analysis and when should it be performed?****Cost Analysis**

Cost analysis is used to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency. Cost analysis is: (1) the review and evaluation of the separate cost elements and profit/fee in an offeror's or contractor's proposal (including cost or pricing data or information other than cost or pricing data), and (2) Application of judgment.

A cost analysis must be performed anytime that certified cost and pricing data is required as defined in FAR 15.403-(4)(a)(1). A proposal must be analyzed to determine what costs to use in developing your negotiation objective and what price you determine to be fair and reasonable. When using cost analysis to negotiate contracts a price analysis must also be performed as it is possible to assure that all of the specific cost elements in a proposal are reasonable and determine that the overall price is not.

In accordance with FAR 15.404-1(d)(2), a cost realism analysis when awarding a cost type contract must be performed. This is a special analysis required primarily to ensure that proposed costs are not unrealistically low. In addition, this analysis provides the foundation for estimating the fee. Furthermore, a cost realism analysis may also be used on competitive fixed-priced incentive contracts or, in exceptional cases, on other competitive fixed-price type contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors proposed costs have resulted in quality or service shortfalls (See FAR 15.404-1(d)(3)). Additionally, one of the criteria required for the determination of reasonableness and allocability is the determination that the cost is allocable to the contract. The FAR at 31.201-4 states that "a cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship.

Subject to the foregoing a cost is allocable if it (a) Is incurred specifically for the contract; (b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or (c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown".

**Direct Costs:** Those costs that are incurred specifically for the contract are identified as direct costs. These costs take the form of material, labor, tooling, subcontract costs and other direct costs. There are two aspects of these costs that must be analyzed, volume and unit price. As an example, the amount of labor hours, rates and skill mix proposed must be analyzed to determine if they are reasonable to perform the contract.

**Indirect Costs:** Indirect costs are (1) costs that cannot practically be assigned directly to the production or sale of a particular product. In accounting terms such costs are not directly identifiable with a specific cost objective, or (2) direct costs of such minor amount that the costs associated with directly accounting for them exceed the benefit of directly accounting for them.

These costs may be treated as indirect costs provided that the accounting treatment is consistently applied and it produces substantially the same results as treating the cost as a direct cost.

The term indirect cost covers a wide variety of cost categories and the costs involved are not all incurred for the same reasons. A firm may have as few as one or as many as one hundred cost accounts. In general indirect cost accounts fall into two major categories:

**Overhead:** These are indirect costs incurred primarily to support specific operations. Examples include: material overhead; manufacturing overhead; engineering overhead; field service overhead; and site overhead.

**General and Administrative Costs (G&A):** These are management, financial, and other expenses related to the general management and administration of the business unit as a whole. These costs may be either incurred by or allocated to the general business unit. Allocation occurs when home office expenses are allocated to a division as a business unit. Examples of G&A costs include; salary and other costs of the executive staff of the corporate or home office; salary and other costs of such staff services as legal, accounting, public relations, and financial offices; selling and marketing expense.

**PART X COST/TECH TRADEOFFS UNDER "BEST VALUE"  
PROCUREMENTS****Background**

Under a "Best Value" continuum there is a recognition that the Government always seeks to obtain the best value in negotiated acquisitions using any one, or a combination, of source selection approaches, and that the acquisition should be tailored to the requirement. At one end of this continuum is the low priced technically acceptable strategy, and at the other end is a process by which cost or price, past performance, and technical considerations can be traded off against each other to identify the proposal that provides the Government with the overall best value. Tradeoffs are used when it may be in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.

A best value analysis lends itself to determining the lowest cost alternative. Best value procurements involve tradeoffs between cost, technical and past performance--For example, if the government's requirement needs are to increase efficiency and thereby reduce the agencies operating cost, the purchase of a high end computer at a high price may a better value than a low end computer at a low price in achieving these requirements.

Establishing the evaluation scheme allowing for a cost/technical tradeoff decision allows for a great deal of discretion and the exercising of judgment by the Source Selecting Official (SSO).

**Applicable statutes, procurement regulations, or small business regulations**

Federal Acquisition Regulation (FAR) 15.101-1 (Tradeoff Process) and FAR 15.308 (Source Selection Decision)

**Issues/Questions**

- What are the steps in performing a cost/tech tradeoff?
- What documentation is needed for a tradeoff decision?

**Discussion Topics**

**What are the steps in performing a cost/tech tradeoff?**

**Steps in Performing a Cost/Tech Tradeoff**

The Request For Proposal (RFP) should contain language which establishes the procedures that allow award to other than the lowest price offeror or other than the highest technically rated offeror. After establishing all factors to be evaluated and their relative importance, the RFP must, "state whether all evaluation factors other than cost or price, when combined, are significantly

more important than, approximately equal to, or significantly less important than cost or price." See FAR 15.101-1(b)(2).

An evaluation of all the technical and management criteria should be performed in accordance with the evaluation scheme provided for in the RFP. It is important for the source evaluation team to develop written narratives which describe the strengths and weaknesses of each offer as they are important tools in making and documenting a tradeoff decision.

The price the Government will use in making a tradeoff decision should be defined in the RFP. For a fixed price offer, this will usually be the offered price. For a cost reimbursable contract, this may be calculated as a "most probable cost" under cost realism procedures.

If the Government receives an offer which, when evaluated offers both the lowest evaluated price and the highest rated technical/management offer, no tradeoff analysis is required. If however, that is not the case, the SSO should determine whether the value of technical and management differences between proposals justifies paying the cost differential between the proposals. The ability to differentiate meaningfully among the proposals is very important in making this decision. Often an RFP will state that the closer the technical score is, the more important cost will become.

#### **What documentation is needed for a tradeoff decision?**

##### **Documentation of Tradeoff Decision**

In accordance with FAR 15.308, source selection decision, "The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the SSO, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision".

The agency files should contain documentation which demonstrates that its evaluation of the offerors responses to a Request for Proposals was reasonable and in accordance with the criteria outlined in the RFP. In a protest, given the discretion granted to agencies in conducting best value procurements, disappointed offerors generally will have only two legal bases for challenging an agency's cost/technical tradeoff analysis-first, that the agency's underlying cost and technical evaluations that formed the basis for the cost/technical tradeoff are inconsistent with the terms of the solicitation, and second that the cost/technical tradeoff decision was unreasonable. There is no legal requirement that the agency quantify any cost/technical tradeoffs in dollars. An agency should use whatever evaluation approach (e.g., narrative, quantification) that best fits its needs. For example, agencies can use narrative explanations of its cost/technical tradeoff so long as it is reasonable and consistent with the criteria identified in the RFP. Some examples of rationale for the business judgments and tradeoffs made by the Source Selection Authority include, but are not limited to, the amount of cost differential, project or service criticality, and potential consequences to the DOE in the event of poor performance. The

Include scores, adjectival ratings, and relative rankings of offerors in the evaluation report.

The level of detail of the evaluation documentation is dependent on the nature, scope, and complexity of the acquisition. Evaluated strengths, weaknesses, and deficiencies must be addressed in sufficient detail to support the rating or ranking given.

The report should reflect the process used to evaluate proposals (consistent with the rating or source selection plan).

The evaluation report should either incorporate, attach, or reference all relevant evaluation information upon which the panel or board used to arrive at its consensus evaluation, e.g., audits reports, technical evaluation reports, etc.

Develop a comparative assessment of proposals that can be used by the source selection authority (SSA) as a basis for making a selection decision.

Provide sufficient information so that the SSA can clearly understand the area being evaluated and how it relates to the stated evaluation criteria.

Provide information that helps the SSA appreciate distinctions among proposals and the relative significance of those distinctions.

Develop documentation which the Government can use as a basis for debriefing unsuccessful offerors.

The report can become either the "script" for the oral debriefing or written excerpts from the report can be provided to individual offerors as a part of a written debriefing.

Consider that the evaluation report may be reviewed by a third party, e.g., GAO or a court, and the report needs to be very definitive as to its conclusions reached and the basis for such conclusions.

**What does an evaluation address and what does a sample resemble?**

### **Sample Evaluation Report Outline**

#### **Executive Summary**

Description of Acquisition and Solicitation

Proposals Received

Summary Evaluation and Ratings

Competitive Range Determination or Award Without Discussions

Special Considerations

Award Recommendation

**Description of Acquisition**

Mission Need and Scope of Work

Programmatic Approvals

Funding

Development of Acquisition Strategy

Procurement History

Development of Source List

**Evaluation Panel/Board Membership**

Name, Functional Title, and Organization

**Chronology of Major Events**

**Description of Request for Proposals (RFP)**

Qualification Criteria

Technical Evaluation Criteria, Sub-criteria, and Relative Weights

Business Management Evaluation Criteria, Sub-criteria, and Relative Weights

Cost/Price Evaluation Criteria and Relative Weight

Fee Evaluation Criteria and Relative Weight

Basis for Award

Amendments to RFP

**Evaluation Process**

Rating/Evaluation Plan

Scoring or Rating Methodology

Use of Committees and Advisors

**Preproposal Conference and Site Tour**

Date and Place

Number of Firms Attending

**Elimination of Proposals Before Initial Ratings**

Late Proposal

Not Meet Qualification Criteria

Totally Unacceptable Proposal

**Proposal Evaluation**

Technical Proposal Evaluation

Strengths and Weaknesses

Scoring or Rating - Initial and final

Business Management Proposal Evaluation

Strengths and Weaknesses

Scoring or Rating - Initial and final

Past Performance Evaluation

Means of Obtaining Information

Results of Past Performance Information

Cost/Price Evaluation

Audit Results

Comparison to Independent Government Cost Estimate

Scoring or Rating - Initial and final

Fee Evaluation



Weighted Guidelines Analysis

Comparison with DOE Fee Curves

Assumption of Risk

**Other Considerations**

Organizational Conflicts of Interest

Foreign Ownership, Control, or Influence

Intellectual Property

Offer and Other Documents

Financial Capability

Responsibility of Prospective Contractors

Special Areas of Concern

**Competitive Range Recommendation**

Included in Competitive Range Report

**Competitive Range Determination**

Included in Final Evaluation Report

**Discussions with Offerors in the Competitive Range**

Principal Areas Covered During Written or Oral Discussions

Summary of Differences Between Initial and Final Proposals

**Award Recommendation**

If Requested by the SSA

**Signature Page for Evaluators**

## **PART XIII PROPERLY DOCUMENTED RECORD**

### **Background**

Proper documentation of the entire Source Selection Process is a critical aspect of source selection that can seriously affect the success of the procurement.

The source selection authority's (SSA) decision shall be based on a comparative assessment of proposals against all source selection criteria in the solicitation. While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA's independent judgment. The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the SSA, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision.

The source selection process requires proper documentation. Proper documentation can greatly assist the SSA in understanding the rationale employed by the evaluation team and give confidence to the SSA that the findings of the Source Evaluation Board (SEB) were consistent with the stated evaluation criteria and rating plan and are reliable. The documentation can also demonstrate to any third-party forum that the evaluation is performed in a fair and honest manner and in a manner consistent with the solicitation. Also, a properly documented record will greatly assist those called on to justify the selection decision.

### **Applicable statutes, procurement regulations, or small business regulations**

FAR 15.308 (Source Selection Decision); FAR 15.102 (Oral Presentations); and 15.305 (Proposal Evaluation)

### **Issues/Questions**

- What documentation should be used to support the selection decision?
- What evidence should be provided regarding proposal evaluations?
- How are oral presentations documented?
- What documentation is necessary regarding electronic communications?

## Discussion Topics

### What documentation should be used to support the selection decision?

#### Documentation for the Selection Decision

FAR 15.308 requires that the "documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the [Source Selection Authority], including benefits associated with additional costs.

In ITT Federal Services International Corp., Comp. Gen. Dec. B-283307.2, Nov 3, 1999, the Comptroller General has interpreted this requirement as follows:

ITT contends that the selection decision document here is inadequate, on its face, to support the cost/technical tradeoff it purports to make. Where a cost/technical tradeoff is made, the selection decision must be documented, and the documentation must include the rationale for any tradeoffs made, "including benefits associated with additional costs." Federal Acquisition Regulation (FAR) sect. 15.308; Opti-Lite Optical, B-281693, Mar. 22, 1999, 99-1 CPD para. 61 at 5. ...The selection decision document here fails to meet the standard set forth in the FAR for explaining the rationale for tradeoffs that lead to incurring of additional costs. As quoted above, the document first concludes that overall the proposals were technically equal, then that CSA's costs were reasonable, and that the quality of CSA's proposal outweighs its higher cost. Not only are these findings inconsistent, but there is no explanation of the benefits associated with the allegedly higher costs of the CSA proposal.

In the above case, the protest was sustained and the decision recommends, in part, that the agency perform a new best value determination.

The Source Evaluation Board (SEB) must bear in mind that while the SSA has a great deal of discretion in making the source selection decision, he/she must first have a full understanding of the evaluations. For this reason the SSA must be presented with sufficient information on each of the competing offerors and their proposals in order to make a comparative analysis and arrive at a rational, fully supportable selection decision. Narrative statements serve as the most important part of the documentation supporting the decision. The selection decision must show the relative differences among proposals and their strengths, weaknesses and risks in terms of the evaluation factors. Each of these is an essential part of providing adequate support for the ultimate selection decision. Narrative statements serve to communicate specific information concerning relative advantages or disadvantages of proposals to the SSA that the rating scheme alone (whether adjectival or numerical) obviously cannot.

Such documentation need not be lengthy, as long as it effectively conveys the basis for the evaluator's assessment.

Proposals receiving the same rating can still have obvious distinctions, requiring an assessment of the offeror's ability to accomplish the task; these distinctions could have a direct impact on the source selection decision.

Preparation of such statements provides an excellent discipline for the evaluators because it forces them to justify their ratings and be consistent with the stated evaluation criteria.

With the high costs for the preparation of a proposal, offerors want to be assured that the evaluation was fair and impartial. Protests often arise when an offeror feels that this was not the case.

The Comptroller General has ruled that an award will not be overturned unless there is no rational basis for the award decision or unless the RFP criteria are not adhered to. See 51 Com. Gen. 272 (1971). Procuring agencies have an obligation to adequately document their source selection decisions so that a reviewing body can determine whether those actions were in fact proper. See KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD

### **What evidence should be provided regarding proposal evaluations?**

#### **Proposal Evaluation**

Evaluation decisions must be based on tangible evidence to support an agency's decision. In *Amtec Corp.*, Comp. Gen. Dec. B-240647, 91-2 CPD, the Comptroller overturned a marginal technical evaluation because the agency record contained no evidence supporting such a grading. Similarly, in *Compuware Corp.* GSBICA 9533-P, 88-3 BCA, the board rejected a cost realism evaluation in which the contracting officer refused to accept auditor conclusions. The board commented that the contracting officer's decision was not supported by any evidence. Therefore, it is clear that proposal evaluations conducted in accordance with FAR 15.305 must be appropriately documented in order to withstand scrutiny.

### **How are oral presentations documented?**

#### **Oral Presentations and Documentation**

There are numerous instances where the source selection decision was overturned because it lacked a reasoned analysis (e.g., there was no documentation of the relative strengths and weakness of the proposals or not being able to furnish sufficient supporting documentation).

Complicating even further the matter of sufficient documentation is the use of oral presentations. FAR 15.102(e) requires that the CO keep a record of oral presentations, but allows wide discretion as to type and degree of documentation required. This places a greater burden on the SEB to be able to capture the data provided by the proposer. To document the oral presentation,

To document the oral presentation, the SEB can either rely on all offerors presenting a sufficient amount of detailed graphics, the dictation skills of evaluators, or by preserving a record of the oral presentation proceedings through the use of video or audio recording. Remember, where an agency fails to create or retain such documentation, it bears the risk that the GAO will not conclude that the agency had a reasonable basis for its procurement decisions. See *American President Lines*, B-236834.2, July 20, 1990.

**What documentation is necessary regarding electronic communications?****Electronic Record Documentation**

Given the need for proper documentation, the advent of the electronic age requires that additional measures be taken to ensure adequacy of the record. Given the requirement for proper documentation, the contract file must still contain the final record. Some offices have been using electronic media for storage of these records. With the rapid changes in information technology, will that media be readable in five or ten years? All critical documents (Source Selection Statements, SEB Reports, approvals, protest decisions, etc.) should still be kept in the official contract file. E-mail correspondence and electronic approvals must still be printed and kept in the official contract file. The electronic age has also revolutionized the way we do business and raises concerns regarding the safeguarding and protecting of procurement sensitive data. When transmitting procurement sensitive data electronically, adequate precautions must be taken to ensure data does not end up in the wrong hands. In those rare cases when sensitive data is transmitted, the use of password is essential.

**PART XV****FOREIGN OWNERSHIP, CONTROL OR INFLUENCE  
(FOCI)****Background**

Before awarding a contract the performance of which requires access to classified information or a significant quantity of special nuclear material, the Department of Energy (DOE) must insure that the contractor has a Facility Clearance. In deciding whether or not to grant such a Facility Clearance, DOE must determine whether or not the contractor is subject to Foreign Ownership, Control or Influence that could pose an undue risk to the common defense and security.

In addition to these regulatory FOCI situations, the DOE is also prohibited by statute from awarding a DOE contract under a national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract. Such an award can be made only after obtaining a Secretarial waiver in accordance with the statutory provisions.

Before awarding a contract the performance of which requires access to classified information or a significant quantity of special nuclear material, DOE must determine whether or not the contractor possesses a "Facility Clearance." A "Facility Clearance" is an administrative determination that a facility is eligible for access to classified information or special nuclear material. In deciding whether or not to grant a Facility Clearance, DOE must determine whether the contractor is subject to Foreign Ownership, Control or Influence.

Foreign ownership, control, or influence means the situation where the degree of ownership, control, or influence over an offeror by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information or special nuclear material may possibly result.

In order to make this determination, DOE obtains FOCI information from offerors using the solicitation provision at DEAR 952.204-73, Standard Form 328, Certificate Pertaining to Foreign Interests, (and various other documents relating to the company's finances; owners, officers and directors, etc.). Based on the information disclosed by the offeror, and after consulting with the DOE Office of Safeguards and Security, the contracting officer must determine that award of a contract to an offeror will not pose an undue risk to the common defense and security.

In those cases where FOCI is present, and the DOE determines that an undue risk to the common defense and security may exist, the offeror or contractor shall be requested to propose within a prescribed period of time a plan of action to avoid or mitigate the foreign influences by isolation of the foreign interest.

The types of plans that a contractor can propose are: (1) measures which provide for physical or organizational separation of the facility or organizational component containing the classified information or special nuclear material; (2) modification or termination of agreements with foreign interests; diversification or reduction of foreign source income; (3) assignment of

specific security duties and responsibilities to board members or special executive level committees; or (4) any other actions to negate or reduce FOCI to acceptable levels. The plan of action may vary with the type of foreign interest involved, degree of ownership, and information involved so that each plan must be negotiated on a case by case basis.

If the offeror and the DOE cannot negotiate a plan of action that isolates the offeror from FOCI satisfactory to the DOE, then the offeror will not receive a Facility Clearance and shall not be considered for contract award.

### **National Security Program Contracts**

In addition to the general FOCI situations described above, which are governed by regulatory provisions (i.e., DEAR), there is also a special FOCI situation that is governed by statute.

Specifically, 10 U.S.C. § 2536, prohibits the award of a Department of Energy contract under a national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract. (Note that the entity must be controlled by a foreign government for this statute to apply.)

"Entity controlled by a foreign government" means any domestic or foreign organization or corporation that is effectively owned or controlled by a foreign government or any individual acting on behalf of a foreign government. "Effectively owned or controlled" means that a foreign government or an entity controlled by a foreign government has the power, either directly or indirectly, whether exercised or exercisable, to control or influence the election or appointment of the Offeror's officers, directors, partners, regents, trustees, or a majority of the Offeror's board of directors by any means, e.g., ownership, contract, or operation of law. "Proscribed categories of information" include: (1) Top Secret information; (2) Communications Security (COMSEC) information (3) Restricted Data, as defined in the Atomic Energy Act of 1954, as amended; (4) Special Access Program (SAP) information; or, (5) Sensitive Compartmented Information (SCI).

The Secretary of Energy may waive this prohibition, pursuant to 10 U.S.C. 2536(b)(1)(A), if the Secretary determines that waiver is essential to the national security interests of the United States.

The Secretary may also waive this prohibition in the case of a contract awarded for environmental restoration, remediation, or waste management at a Department of Energy facility, if the Secretary determines that the waiver will advance the environmental restoration, remediation, or waste management objectives of the Department and will not harm the national security interests of the United States, and the entity to which the contract is awarded is controlled by a foreign government with which the Secretary is authorized to exchange Restricted Data under section 144c of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)) (10 U.S.C. 2536(b)(1)(B)).

**Applicable statutes, procurement regulations, or small business regulations**

10 U.S.C. § 2536; Executive Order 12829, Jan 6, 1993, National Industrial Security (NISIP); National Industrial Security Program Manual, DOD 5220.22-M; Department of Energy Acquisition Regulations (DEAR) 904.70 (Foreign Ownership, Control or Influence over Contractors); DEAR 952.204-2, (Security Clause); DEAR 952.204-73 (Facility Clearance); DEAR 952.204-74 (Foreign Ownership, Control or Influence over Contractors); and Standard Form 328, (Certificate Pertaining to Foreign Interests);

**Issues/Questions**

What procedures are followed when a contractor requires access to classified information or a significant quantity of special nuclear material?

**Discussion Topics**

**What procedures are followed when a contractor requires access to classified information or a significant quantity of special nuclear material?**

The contracting officer should receive a Procurement Request-Authorization (DOE F 4200.33 or equivalent) and Contract Security Classification Specification (CSCS) (DOE F 5634.2) from the procurement request originator.

Upon receipt of these forms, the contracting officer must include the appropriate terms and conditions in the solicitation [DEAR 952.204-73, Facility Clearance], and should state in the solicitation that if an offeror is included in the competitive range, they may be required to complete the FOCI Certificate Pertaining to Foreign Interests, SF 328, which contains questions concerning the degree and extent of foreign ownership and control over the offeror.

Once the contracting officer identifies a competitive range, the Defense Security Service/ Central Verification Activity should be reviewed and the local safeguards and security office should be contacted to determine if the possible offerors have an approved facility clearance.

If an offeror possesses a facility clearance, the contracting officer will send the CSCS (DOE F5634.2) to the local DOE safeguards and security office for approval. Once the local DOE safeguards and security office signs and returns the CSCS to the contracting officer, an award of the contract can be made.

If an offeror in the competitive range does not possess a facility clearance, the contracting officer shall forward a FOCI package to the offeror (and any tier parents, if applicable). This package includes the Certificate Pertaining to Foreign Interests (SF 328).

After obtaining the Certificate Pertaining to Foreign Interests (SF 328) and accompanying documents from an offeror, the contracting officer must review the submission to ensure that the



SF 328 as well as all supporting documentation are attached prior to submitting the package to safeguards and security.

Upon receipt of the complete FOCI package, the contracting officer forwards the FOCI package to safeguards and security for processing.

Upon completion of DOE's review of the offeror's foreign involvement, the local safeguards and security office should provide the contracting officer with written notification of the results of the FOCI review. If the FOCI determination is favorable and the offeror is granted a DOE-approved facility clearance, the local DOE safeguards and security office will sign and return the DOE F 5634.2 (CSCS) to the contracting officer. (If the FOCI determination is unfavorable, the safeguards and security office will attempt to negotiate a plan to negate or mitigate FOCI. If a satisfactory plan cannot be negotiated then the offeror will not receive a Facility Clearance and the offeror shall not be considered for contract award.)

Contract award can be made upon: (1) receipt of notification of a favorable FOCI determination from the local safeguards and security office, (2) receipt of the signed DOE F 5634.2 (CSCS) from the local DOE safeguards and security office, and (3) assurance from the contracting officer that the appropriate security clauses are included in the contract.

It should be noted that if, after contract award, a contractor's FOCI situation changes so that it becomes subject to FOCI for the first time or the extent and nature of FOCI changes, DOE must assess whether those changes will pose an undue risk to the common defense and security.

In making this determination, the Department considers proposals made by the contractor to avoid or mitigate foreign influences. If these foreign influences cannot be avoided or mitigated, the contracting officer may terminate the contract.

The contracting officer may terminate the contract for default if the contractor fails to meet obligations imposed by the FOCI clause (e.g., provide the information required by the clause, or make the clause applicable to subcontractors), or if, in the contracting officer's judgment, the contractor creates a FOCI situation in order to avoid performance or a termination for default. The contracting officer may terminate the contract for convenience if the contractor becomes subject to FOCI and for reasons other than avoidance of performance of the contract, cannot, or chooses not to, avoid or mitigate the FOCI problem. In any event, without an adequate mitigation plan, the contractor's Facility Clearance will be terminated and they can no longer perform work requiring access to classified information or a significant quantity of nuclear material.

**PART XVI DEBRIEFINGS****Background**

In FAR Part 15 procurements, contracting officers are required to offer debriefings to all unsuccessful offerors. The debriefing is the method by which the offerors obtain information to decide whether to protest and is a possible venue for heading off a protest. Debriefings need to be informative and professionally presented. They should never degenerate into debates over the propriety of the source selection process or the accuracy of the government's evaluation. The general approach to a debriefing should be to provide all required information, satisfy the debriefed offeror's reasonable questions about the procurement, and provide as much information as possible without prejudicing the procurement in the event it must be reopened for any reason. The timing of a debriefing affects both the timeframe for filing a GAO protest and also the time within which a protest will require the protested contract performance to be suspended. Because most of DOE's Part 15 procurements are for services, this guidance is written with services procurements in mind.

When a contract is awarded on a basis other than price alone, unsuccessful offerors, upon their written request, shall be debriefed as soon as possible and furnished the basis for the selection decision and contract award.

However, the debriefing requirements only apply to procurements carried out under FAR Part 15 requirements. There is no requirement for a debriefing for placement of an order under a schedule contract pursuant to FAR Subpart 8.4, for placement of a contract using simplified acquisition procedures under FAR Part 13 (including the test program for certain commercial items in FAR Subpart 13.5), for placement of a task or delivery order under an indefinite delivery contract pursuant to FAR Subpart 16.5, for an contract issued pursuant to the sealed bid procedures of FAR Part 14, or at the time an option is exercised.

The debriefing should provide the unsuccessful offeror with sufficient information to enable him to understand why his proposal was not selected and to enable him to present a better proposal in a future competition. In other words, the information should be of "value" to the unsuccessful offeror.

**Applicable statutes, procurement regulations, or small business regulations**

FAR 15.503 (Notifications to Unsuccessful Offerors); FAR 15.505 (Preaward Debriefing of Offerors); FAR 15.506 (Postaward Debriefing of Offerors); FAR 15.507 (Debriefing Available When Procurement Reopened); FAR 33.104(c) (Interrelationship of Debriefing and Stay/Suspension of Contract); 4 C.F.R. § 21.2(a)(2); 31 U.S.C. § 3553(d)(4)(B) (Requiring Suspension of Protested Contract Performance if Protest is Filed Within Five Days of Required and Requested Debriefing); and 41 U.S.C. § 253b(e), (f), (g) (Preaward and Postaward Debriefing Requirements).

**Issues/Questions**

- What should be the contracting officer's strategy?
- When should debriefings be held and how should they be scheduled?
- What is the effect of the debriefing schedule on potential protests?
- What are the special considerations for preaward debriefings?
- What the clocks start when debriefings are conducted?
- What information is to be provided and when should it be provided?
- What information may not be provided?
- Who should attend debriefings?
- What are "Open Book" debriefings?
- What common questions or problems are associated with debriefings?

**Discussion Topics****What should be the contracting officer's strategy?****The Contracting Officer's strategy**

The contracting officer should plan for the debriefing well before award is made. Based on the particular circumstances of the procurement, the contracting officer should devise a debriefing strategy to provide as much information as the offeror might reasonably request and should prepare for likely offeror questions. Some contracting officers have found it useful to request the offerors to provide any questions in writing a day or so before the debriefing. This gives the agency time to review the questions and provide a more cogent answer to the questions. Even if the offeror provides questions in advance, it should not and cannot be prohibited from posing additional questions at the debriefing. The offeror should come away from the debriefing with an understanding of why its proposal was not selected. Oftentimes there are one or two elements of the offeror's strategy that negatively affected the evaluation and that can be summarized for the offeror's benefit. For example, an offeror might have decided that it understood the government's requirements better than the government and pursued a strategy of offering the government what the offeror believed was best notwithstanding the requirements in the solicitation.

In this instance, it can be helpful to be prepared to review the portion of the solicitation that stated these requirements. Where discussions were held, it can be very helpful to point out to an offeror where the issue that led to its lack of success was raised in discussions.

An understanding of the perspective of a disappointed offeror is sometimes useful in conducting a debriefing. Preparation and submission of a proposal may be a time consuming, costly, and a sometimes emotional exercise for the offeror's proposal team. Nonacceptance of a proposal under such circumstances can produce a degree of emotional and professional trauma in the team members. In response disappointed offerors may react with resentment ("How could I not win?!"), suspicion ("This process must be rigged!"), and anger ("The agency has it in for me!"). As a consequence, many debriefings are not viewed by disappointed offerors as an opportunity

to learn how to improve the next time, but rather as an opportunity to vent, demonstrate the poor judgment of the selecting official and evaluators, and identify a basis to overturn the decision through a bid protest. Although government personnel frequently respond to this reaction by offering as little information as possible, this is not a desirable strategy for the debriefing. Indeed it is frequently more productive to use the debriefing to discharge the emotion, demonstrate the procedural credibility of the decision, and convince the disappointed offeror that a basis for protest does not exist. Strategies for doing so should be fully considered in preparing for the debriefing.

### **When should debriefings be held and how should they be scheduled?**

The general principle applicable to debriefings is that an unsuccessful offeror should be offered a debriefing soon after DOE determines that the offeror is unsuccessful. The FAR distinguishes between preaward and postaward debriefings, depending on when the debriefing is held. The FAR establishes a clear preference that an offeror excluded from the competitive range be provided with a preaward debriefing, and we address the implications of this choice in the next section. A postaward debriefing should be held as soon as possible after the award.

The optimum schedule has the contracting officer faxing a letter to the unsuccessful offeror on day 0, informing the unsuccessful offeror of its right to request a debriefing within three days and, in the same letter, informing the unsuccessful offerors of the offered date for their debriefings should they choose to request a debriefing. The offered date should optimally be a date between four and eight days after the unsuccessful offeror letter is faxed. An unsuccessful offeror does not have the right to any particular schedule or location for the debriefing. For postaward debriefings, the letter offering the debriefing optimally should be sent to the offeror on the day of award. For preaward debriefings, the letter should be sent as soon as DOE makes a determination that the offeror is no longer under consideration for award.

### **What is the effect of the debriefing schedule on potential protests?**

#### **Effect of the debriefing schedule on potential protests**

In a FAR Part 15 procurement, a company cannot pursue a GAO protest on an issue other than a solicitation issue before its debriefing, if that debriefing was "requested and required." GAO will dismiss a protest filed before the debriefing as premature. Therefore, it is generally best to schedule the debriefing very soon after the offeror is no longer under consideration for award.

### **What are the special considerations for preaward debriefings?**

#### **Special considerations for preaward debriefings**

If the offeror was excluded from the competitive range, the debriefing generally should be held as a preaward debriefing soon after the offeror is notified of its exclusion from the competitive range. The debriefing may be held as a postaward debriefing based on the CO's decision or the offeror's request, but these choices have different consequences.

**If the contracting officer delays the preaward debriefing**

The contracting officer has the discretion to delay the debriefing until after award, based on "compelling reasons" that holding a preaward debriefing is not in the best interests of the government. The contracting officer is required to document the rationale for delaying the debriefing. If the government decides to delay the debriefing until after award, the unsuccessful offeror cannot protest until after the debriefing and, if there is a successful protest, the procurement actions after the offeror was excluded may be nullified.

**If the offeror requests that the preaward debriefing be delayed**

The offeror can request that the government delay a preaward debriefing until after award. In the event that the debriefing is delayed due to the offeror's request, the contracting officer should indicate in writing that debriefing is being postponed at the offeror's request. In the event the offeror requests the government to delay the debriefing from preaward to postaward, GAO generally will not find a protest based on the debriefing to be timely.

**What clocks start when debriefings are conducted?****Clocks**

Once a "required and requested" debriefing is held, two clocks start to run on the offeror's time for filing a protest. The first clock determines whether GAO will consider the protest. Generally, for a protest to be timely filed at GAO, it must be filed within ten days after the debriefing. If the protester waits until more than ten days after it learned of the basis for its protest and that date is more than ten calendar days after the debriefing, GAO will dismiss the protest as untimely. Please note that protesters can also pursue protests at the Court of Federal Claims, which does not have a ten calendar day time limit for filing protests. The second clock determines whether the agency will have to stay the award of the protested contract or suspend performance on the protested contract. If a protest is filed at GAO and GAO notifies DOE of the protest within either five calendar days after debriefing or ten calendar days after contract award, whichever is later, DOE must suspend performance of the protested contract. If GAO notifies DOE of a protest filed before award is made, DOE must stay the award of the protested contract. In both cases, the stay is in place until GAO decides the protest or until DOE overrides the stay.

**What information is to be provided and when should it be provided?**

FAR 15.506(d) and 15.505(e) set forth detailed lists of information to be provided and the applicable list provides a fairly good agenda for the debriefing.

**Information in advance**

Much of this information can be provided in advance of the actual debriefing, either in the unsuccessful offeror letter or in a later written communication prior to the debriefing. It is a

better practice to provide the debriefed offeror with a copy of its own evaluated strengths and weaknesses before the debriefing. This practice saves time for everyone, and prevents disagreement over what was said, gives the offeror a chance to get past any emotional reaction to the strengths and weaknesses in the privacy of its offices, and usually improves the cogency of the questions asked at the debriefing.

### **Dialogue**

Because the debriefing rules require the government to provide reasonable responses to relevant questions about whether source selection procedures were followed, it is virtually impossible to provide a complete debriefing to an offeror without an opportunity for dialogue, either in person or by telephone.

### **Interpretation of "overall ranking" and "technical rating"**

When FAR 15.506(d)(3) refers to providing the "overall ranking of all offerors," it means the ranking when there was a combined ranking including cost/price and technical factors and does not require the CO to provide just the technical rankings or just the cost/price rankings. DOE generally has not performed such rankings in its source selection process, nor are such rankings required. When FAR 15.506(d)(2) refers to providing the "technical rating" of the awardee and of the debriefed offeror, it does not mean that every factor and sub-factor score must be revealed. If a competitive range was drawn and discussions were held, there is no requirement to provide the offeror with its or the awardee's pre-discussions scores. There is no requirement to provide the offeror with the awardee's sub-factor scores. Providing more than the required information concerning the awardee's scores can be regrettable if the procurement must be reopened for corrective action, a change in requirements, or some other reason. Moreover, in some instances, providing specific scoring information could amount to a violation of the prohibition against providing point-by-point comparisons between the awardee's and the debriefed offeror's proposals.

### **Whose ratings should be provided?**

In the unlikely and hopefully rare event that the source selection official disagrees with aspects of the technical evaluation committee's report, either with respect to scores or to the strengths and weaknesses, the information that is required to be provided to the offeror is the evaluation on which the selection was based, that is, the source selection official's evaluation.

### **What information may not be provided?**

FAR 15.505(f) and 15.506(e) provide detailed lists of information that must not be provided in the debriefing. The usual item that comes up is the prohibition on providing "point-by-point comparisons of the debriefed offeror's proposal with those of other offerors." For this reason, it is advisable that the government not have the other offerors' proposals or the evaluation of the other offerors in the debriefing room. Some agencies take the position that revealing detailed score

information about the awardee may constitute providing point-by-point comparisons. An exception to these limitations exists in the form of an "open book debriefing" described below.

### **Who should attend debriefings?**

The FAR provides that the contracting officer is in charge of the debriefing and anticipates that he or she will get support from technical and legal personnel as needed. Neither the Source Selection Authority (SSA), nor the SEB Chair, or the individual SEB team members are required to attend. Normally it may be sufficient to have the contracting officer, a technical evaluator (to ensure that communication conveying the technical evaluation are accurate), and counsel to the procurement attend the debriefing. It is a good practice to have counsel present, especially if the offeror indicates it is bringing legal counsel to the debriefing, there are indications that a protest may be filed, or the procurement is significant based on dollar size, complexity, or other sensitivity. On those occasions where the contracting officer does not have the knowledge or expertise to explain the cost evaluation, it is advisable to bring someone who has that knowledge and expertise. Notwithstanding the foregoing, it should be noted that the presence of other critical officials in the source selection process such as the SSA and the SEB chair may aid in the presentation to the disappointed offeror and add to the credibility of the source selection.

These officials are particularly useful in explaining the basis for the selection decision and the results of the SEB's evaluation of the offeror's proposal. As the number and type of participants in the debriefing grows, however, the contracting officer must take particular care in preparing for and controlling the communication. Coordination with counsel is critical.

### **What are "Open Book" debriefings?**

#### **"Open Book" debriefings**

In some very large, complex procurements, generally M&O procurements, DOE has used a technique called open book debriefings, in which DOE and all the offerors enter into a confidentiality agreement that permits DOE to reveal more information in the debriefing than is normally permitted. This technique has been extremely successful, but it is properly reserved for very large, complex procurements that do not involve repetitive requirements. If used improperly, this technique may conflict with the FAR and/or result in potential violations of the Trade Secrets Act (which subject the government personnel to personal criminal penalties as well as significant potential fines). Therefore, this technique should only be used after consultation with DOE counsel who can draft the appropriate agreements and ensure that all necessary consents are obtained.

## **What common questions or problems are associated with debriefings?**

### **Common questions and problems**

#### **Do not debate the evaluation or the selection**

The job of the debriefer is to provide information to the offeror about the procurement and not to reconsider the evaluation or debate it. This means that it is more important to listen to complaints about the evaluation results than to respond to them. It is especially important not to speculate about what would have happened if the offeror had proposed something different or a lower price.

#### **Be sure the debriefing has a definite conclusion**

The debriefing should have a definite conclusion so that the time when the offeror's two protest clocks begin to run is clear. Once DOE has provided the required information and the offeror has finished asking its "relevant questions about whether the source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed," the contracting officer should indicate that the debriefing is concluded. This means that it is strongly ill-advised to tell a protester that "we'll get back to you" on a topic. If necessary, take a short break during the debriefing and seek whatever advice or information or document is needed. A well-prepared debriefing team almost never needs an additional day to provide required information or respond to relevant questions.

#### **Recording the debriefing**

The government is not required to record the debriefing nor to permit the debriefed offeror to make an audio or video recording. DOE contracting officers have generally denied offerors' requests to record a debriefing. If the contracting officer considers agreeing to a request to record the debriefing, he or she should insist that two identical recordings be made and one left with the agency. This will avoid disputes over whether the recording was altered in some way. The contracting officer is required to prepare a summary of the debriefing and include it in the contract file.

#### **Even untimely debriefing requests should be accommodated**

If an offeror does not request a debriefing in a timely fashion, but later requests a debriefing, the better practice is to provide the debriefing but to be clear that it is an accommodation and not a "requested and required" debriefing. The contracting officer should, however, insist that the request be in writing and should include documentation in the file that the debriefing was not timely requested.



**The awardee is also entitled to a debriefing**

Although debriefings are commonly provided to unsuccessful offerors, FAR 15.506(a)(1) provides that offerors can request debriefings and does not exclude the awardee.

**Debriefings go forward even if there is a protest**

Sometimes an offeror will protest or state its intent to protest before the debriefing. This does not affect the offeror's right to a debriefing. In these instances, it is obviously prudent to have counsel present and involved in the debriefing planning.

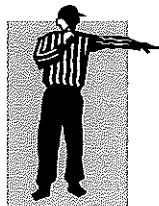
**Take a break**

It is generally advisable to take breaks during the debriefing if the government attendees need to caucus concerning a question. Such discussion should take place in a different room and out of the hearing of the offeror. In addition, a break can be useful to permit the offeror to consolidate its questions and recover its composure.

**Finally, do not obsess**

While the debriefers should make every effort to be accurate during the debriefing, keep in mind that the statements made in a debriefing will virtually never form the basis of a GAO decision to sustain a protest. There are legions of denied protests where the information provided at the debriefing was inaccurate in some way or where the protester claims it was told one thing at the debriefing while the evaluation record shows the opposite. Moreover, GAO will not address the quality of the debriefing in a protest decision.

## PROTESTS



### Guiding Principles

- Resolving solicitation issues before a protest is lodged may avoid a protest and associated costs and delays in contract award.
- When a protest is lodged, prompt action by the Contracting Officer will help to assure efficient and timely resolution of the protest.

*[Reference: FAR 33.1, DEAR 933.1, GAO Regulations at 4 CFR 21]*

### Overview

This chapter discusses the processing of documents in response to a protest against award lodged with the contracting activity, the Procurement Executive, the General Accounting Office, or the Federal courts.

### Background

While the FAR, DEAR and GAO regulations referenced above provide detailed direction for the handling of protests, this Guide section presents additional information which may be helpful to those personnel who are involved with the protest process.

Protests are a structured means by which offerors challenge some aspect of the Department's handling of a procurement. Protests can also provide the Department with an opportunity to remedy significant errors in a procurement.

### Levels of Protests

In order to maximize the opportunity to remedy any procurement errors, to reduce costs and delays in procurements, and to enhance the ability of the Department to meet the needs of its customers, protests are handled at the least formal level possible.

Currently, protests can be filed at three levels: to the agency (which includes both protests to the Head of the Contracting Activity and to the Procurement Executive); to the General Accounting Office (GAO); and, to federal courts (including the United States Court of Federal Claims and United States District Courts).

If an offeror contacts the Contracting Officer or the Contract Specialist prior to filing a protest, the Contracting Officer or specialist should attempt to address the offeror's concerns in order to avoid the filing of a protest, and should encourage the potential protester to pursue any protest within the agency before filing a protest with GAO or a suit with the appropriate Federal court. The Contracting Officer coordinates the handling of any protest with their appropriate Counsel office.

## **Processing Protests**

Upon receiving notice of a protest, the Contracting Officer withholds award or suspends contract performance in accordance with the provisions at FAR 33.103(f), 33.104(b), (c), and (d), and DEAR 933.103(f), 933.104(b) and (c).

### **I. Protests to the Department of Energy Contracting Activity or Procurement Executive**

Protests to DOE will be decided either by the Head of the Contracting Activity or the Procurement Executive. Unless the protester requests that the protest be decided by the Procurement Executive, or the circumstances at DEAR 933.103 (i)(1)(i), (ii), or (iii) exist, protests to DOE will be decided by the Head of Contracting Activity (HCA).

The Procurement Executive or the HCA (whichever is the deciding authority) will issue a decision on the protest within 35 calendar days, unless a longer period of time is determined to be needed.

Protest decisions must be in writing. Even if the decision is to dismiss the protest on a procedural ground (such as lack of timeliness, lack of interested party status, etc.), the protest decision should note the allegations of the protest. Protest decisions should be sent by fax to the protester (if the protester has designated representation, the decision should be sent to the representative), or if the protester does not have a fax, the decision should be sent by certified mail with a return receipt or other means that provides evidence of receipt.

The contract file should include the protest decision and evidence of the protester's receipt of the protest decision (e.g., fax confirmation printout or handwritten notation of oral confirmation of fax receipt).

#### **Protests to Be Resolved by the Contracting Activity**

The Contracting Officer makes every attempt to resolve the protest through direct negotiations with the offeror with due regard to the need for amending the solicitation. The Contracting Officer prepares a report including the elements at FAR 33.104(a)(3)(iii) and assembles the information necessary to enable review of the protest and the issuance of a decision by the HCA. The Contracting Officer provides a copy of the protest and the protest decision of the HCA to the Office of Contract Management.

#### **Protests to Be Resolved by the Procurement Executive**

The Office of Contract Management is notified immediately and provided a copy of any protest that is to be decided by the Procurement Executive.

The Contracting Officer prepares a report similar to that discussed in FAR 33.104(a)(3)(iii). The report is forwarded to the Office of Contract Management within 21 calendar days of receipt of a

protest. The Contract Specialist consults with the Office of Contract Management concerning the number of copies needed and any other information required.

The Office of Contract Management will explore with the protester whether the use of alternative dispute resolution techniques may assist in the resolution of the protest decision.

## **II. Protests to the General Accounting Office (GAO)**

Not later than one (1) day after a protest is filed with the GAO, the protester provides a copy of its complete protest to the contact person stated in the solicitation or to the Contracting Officer. Within one (1) day of receipt of a protest, the Contracting Officer must give notice of the protest to the contractor, if award has been made, or, if no award has been made, to all offerors who appear to have a substantial and reasonable prospect of receiving award if the protest is denied. The protest submissions are provided to all such parties unless one or more of the parties has identified sensitive information and requests a protective order. In that event, the Contracting Officer obtains a redacted version from that party(ies) for appropriate dissemination. The Contracting Officer works with the assigned protest attorney from the cognizant Counsel office in reviewing the merits of the protest, and preparing the agency report.

The GAO typically schedules a status conference among the parties to discuss the protest within a week after the protest is filed, so it is important to coordinate with the protest attorney quickly. In many protests, DOE will produce documents to the protester's counsel within ten days after the protest is filed, and may also be required to submit a list of all relevant documents to the GAO and the protester within 25 days after the protest is filed.

A complete report is submitted to the GAO within 30 days from the date of receipt of the telephonic notice of the protest from GAO (or within 20 days after receipt of notification of a determination to use the express option). The report to GAO includes the elements addressed at FAR 33.104(a)(3)(iii).

GAO makes every effort to issue a decision on the protest within 100 calendar days after the initial protest is filed, even if the protester has filed a supplemental protest after the initial protest.

## **III. Protests in Federal Courts**

When a suit protesting the award of a DOE contract is filed with the appropriate Federal court, the Department will be represented by the United States Attorney having jurisdiction in the court where the protest suit was filed.

The cognizant Counsel office acts as liaison for the Department. The Contracting Officer provides all necessary support as promptly as possible as requests are made during the pendency of the litigation.

## Alternative Dispute Resolution



### Guiding Principle

Employing alternate dispute resolution techniques in contractual disagreements may result in equitable settlements without going through the formal litigation process, resulting in less costly, and more timely, resolutions.

[Reference: FAR 33; DEAR 933]

### Overview

This section provides guidance for the use of alternative dispute resolution techniques in connection with disputes that arise under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. sections 601-613.

### Background

Alternative Dispute Resolution (ADR) refers to a range of procedures intended to resolve disputes at less cost, more quickly, and with greater satisfaction for the parties involved than is possible through formal litigation.

The techniques are flexible and adaptable to the particularities of each individual case and permit the parties to take into account their respective litigation risks. The employment of ADR is a consensual matter and cannot be instituted without the agreement of both DOE and the contractor.

### Policy

It is DOE policy to make maximum use of ADR as an alternative to formal litigation where it appears such an approach will facilitate dispute resolution. The goal is to resolve the dispute at the earliest stage feasible, preferably before the contracting officer's final decision, by the fastest and least expensive method possible and at the lowest appropriate organizational level. A preference for the early application of ADR is reflected at FAR 33.204, which states, "The Government's policy is to try to resolve all contractual issues by mutual agreement at the contracting officer's level."

The contracting officer is key to resolving contentious issues before they become unnecessary contract disputes. By exploring all reasonable avenues for a negotiated settlement with the contractor, the contracting officer can avoid most disputes.

When all possibilities for negotiation have failed, the contracting officer should endeavor to move the potential dispute into ADR.

The Contract Disputes Act (CDA), as amended by the Federal Acquisition Streamlining Act of 1994, requires that, for small businesses, "In any case in which the contracting officer rejects a contractor's request for alternative dispute resolution proceedings, the contracting officer shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of title 5, United States Code, the Alternative Means of Dispute Resolution Act, or such other specific reasons that alternative dispute resolution procedures are inappropriate for the resolution of the dispute."

In any case in which a contractor rejects a request of an agency for alternative dispute resolution proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

ADR should also be considered for disputes that are before the Energy Board of Contract Appeals (EBCA) and disputed claims before they have been appealed to either the EBCA or the United States Court of Federal Claims. Since United States Federal Claims Court cases are under the control of the Justice Department rather than DOE, DOE needs to coordinate ADR in those actions with DOJ.

### **Attachment**

The attached guidance is used for all contract claims pursuant to the CDA or appeals before the Energy Board of Contract Appeals, whether in advance of litigation or after litigation has commenced. If the parties are unable to satisfactorily resolve the dispute using ADR, or cannot agree on its application, they resume the formal litigation process.

**ATTACHMENT 1****Alternative Dispute Resolution Guidance****When should ADR be used?**

Generally, ADR should be considered whenever a dispute arises as to the parties' rights or obligations under a government contract and that dispute remains unresolved after exploration of issues by the parties. The use of ADR represents a business decision on the part of the parties, divorced from the emotions surrounding a particular dispute, that an alternative method of resolving a claim is preferable to the expense, delay, and risks associated with formal litigation. It should be remembered that ADR is in many cases risk-free; if no resolution is reached, the parties retain all of their legal rights.

The best candidates for ADR treatment are those cases in which only facts are in dispute, while the most difficult are those in which disputed law is applied to uncontested facts. However, the fact that resolution of the dispute may involve legal issues, such as contract interpretation, does not preclude that case from consideration. Likewise, the amount in controversy is a relevant, but not controlling, factor in the decision whether to use ADR. It is strongly suggested, however, that the parties give serious consideration to using ADR in all disputes where the amount in controversy is less than \$100,000. ADR may also be particularly effective in large, complex, multi-claim construction-related disputes.

As a general rule, and subject to the qualifications discussed below, if the responsible agency official answers yes to one or more of the following questions, then ADR is the preferred way to resolve the dispute:

- (1) Have settlement discussions reached an impasse?
- (2) Have ADR techniques been used successfully in similar situations, so far as we know?
- (3) Is there a significant disagreement over technical data, or is there a need for independent, expert analysis?
- (4) Does the claim have merit, but is its value overstated?
- (5) Are there multiple parties, issues, and/or claims involved that can be resolved together?
- (6) Are there strong emotions that would benefit from the presence of a neutral?
- (7) Is there a continuing relationship between the parties that the dispute adversely affects?
- (8) Does formal resolution require more effort and time than the matter may merit?

This is by no means an exhaustive list of issues to consider when determining whether or not to use ADR. Each case will have its own individual characteristics that might influence the official's decision whether or not to use ADR. Each case, therefore, should be evaluated on its own merits, with the caveat that it is the policy of DOE to resolve disputes by ADR whenever feasible.

Because of its ADR experience, ability to assist in developing ADR agreements and protocols, and cost-effectiveness, EBCA is often an obvious choice to provide/conduct all forms of ADR services, as required, for DOE whether prior to or after the issuance of a final decision by the contracting officer, so long as the contractor agrees. The EBCA should be consulted by the contracting officer and/or the contractor in the earliest stages of ADR planning whenever the EBCA may become a source of ADR services. Contracts for the services of third party neutrals are also authorized, the costs of which should ordinarily be shared by the parties. Other federal agencies can also provide neutrals at low cost.

### **When Is Use of ADR Less Likely To Be Effective?**

Although the use of ADR in any case should not be precluded, the following types of cases have generally proven to be less likely candidates for ADR:

- (1) Those involving disputes controlled by clear legal precedent, making compromise difficult.
- (2) Those whose resolution will have a significant impact on other pending cases or on the future conduct of business.

In these cases, the value of a definitive or authoritative resolution of the matter may outweigh the short-term benefits of a speedy resolution by ADR.

In general, if an agency official answers yes to any of the following questions, then the dispute is not one that is appropriate for ADR, and the parties should prepare for litigation:

- (1) Is the dispute primarily over issues of disputed law rather than fact?
- (2) Is a decision with precedential value needed?
- (3) Is a significant policy question involved?
- (4) Is a full public record of the proceeding important?
- (5) Would the outcome significantly affect nonparties?
- (6) Are the costs of pursuing an ADR procedure greater (in time and money) than the costs of pursuing litigation?
- (7) Is the nature of the case such that ADR might be used merely for delay?

### **What are the Steps in the Process?**

The following six steps are associated with using ADR concepts:

**Step One** - Unassisted negotiations. Parties try to work out disagreement among themselves.

**Step Two** - Before issuing a final decision (decision) on a claim, the contracting officer consults with the DOE ADR specialist concerning whether the disagreement appears susceptible to resolution by ADR. The FAR recognizes the potential usefulness of ADR at this early stage in the process by recommending the use of informal discussions between the parties. In particular, the CO may want to propose to the other party, one, or a combination, of the following ADR



techniques, and the parties may request the Chair of EBCA, or any other acceptable federal or nonfederal neutral, to provide/conduct:

- (a) Mediation
- (b) Neutral Evaluation
- (c) Settlement Judge
- (d) Mini-trial

**Step Three** - If the claim either cannot be settled by the parties at Steps One or Two, the CO must prepare to issue a decision. If the claim involves a factual dispute, the CO shall send the contractor a copy of the proposed findings of fact and advise him that all supporting data may be reviewed at the CO's office. The contractor shall be requested to indicate in writing whether it concurs in the proposed findings of fact and, if not, to indicate specifically which facts it is not in agreement with and submit evidence in rebuttal. The CO shall then review the contractor's comments and make any appropriate corrections in the proposed findings of fact.

**Step Four** - The CO shall issue a decision on each contract dispute claim within sixty (60) days from the receipt of the written request from the contractor, or within a reasonable time if, the submitted claim is over \$100,000. The decision is a written document furnished the contractor, which contains the final findings of fact and reasons upon which the conclusion of the CO is based.

**Step Five** - The contractor may appeal the CO's decision to the EBCA or to the United States Court of Federal Claims. EBCA recognizes that resolution of the dispute at the earliest stage feasible, by the fastest and least expensive method possible, benefits both parties. The Board has several model procedures available. The Federal Claims Court also has ADR procedures available to the parties. The Justice Department is responsible for entering into such procedures, but ordinarily consults with DOE before doing so. DOE fully supports the use of ADR in appropriate cases before the Federal Claims Court.

**Step Six** - DOE's decision whether to use ADR at this stage should be made by assigned counsel, in consultation with the CO. If DOE and the contractor agree that the claim is susceptible to resolution by ADR, then the next step is to select and consult with the contractor and attempt to reach agreement on an appropriate procedure.

### **What are Examples of ADR Techniques?**

**Mini-trial.** Brings together an official from each of the contracting parties with authority to resolve the dispute. Neither official should have had responsibility for either preparing the claim (in the case of the contractor), denying the claim (in the case of DOE), or preparing the case for trial. They hear abbreviated, factual presentations from a representative of each party and then they discuss settlement. It is governed by a written agreement between the parties, which is tailored to the particular needs of the case. It generally has three stages, which usually can be completed within 90 days.

**(1) The prehearing stage.** Covers the time between agreement on written procedures and commencement of hearing. Parties, with assistance of a neutral, complete whatever preparation is provided for in agreement, such as discovery and exchange of position papers. This consumes the bulk of the time to complete the mini-trial.

**(2) The hearing stage.** Representatives present their respective positions to the officials. Each representative is given a specific amount of time within which to make the presentation. How that time is utilized is solely at the discretion of the representative. There may also be an opportunity for rebuttal and a question and answer period for the officials. This stage usually takes 1 to 3 days.

**(3) The posthearing discussion stage.** Officials meet to discuss resolving the dispute. The mini-trial agreement should establish a time limit within which officials either agree or settle the matter or agree to resume the underlying litigation. These discussions are settlement negotiations and, as such, may not be used by either party in subsequent litigation as an admission of liability or any aspect of settlement.

The agreement may provide for services of a neutral advisor. A potential source of a neutral advisor is the EBCA, which has substantive experience and established reputation for objectivity and cost effectiveness. Other federal agencies can provide neutrals at minimum cost. It should be noted that the employment of a neutral advisor from the private sector will necessitate cost-expenditure by DOE.

**Mediation.** Mediation is a process in which the disputing parties select a neutral third party to assist them in reaching a settlement of the dispute. The process is private, voluntary, informal and nonbinding. It provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or could not be addressed by judicial action. The mediator has no power to impose a settlement. The function of the mediator is determined in part by the desires of the parties and in part by the attitude of the individual chosen to mediate. Some mediators propose settlement terms and attempt to persuade parties to make concessions. Other mediators work only with party-generated proposals and try to help parties realistically assess their options. Some mediators work primarily in joint sessions with all parties present while others make extensive use of private caucuses. At a minimum, most mediators will provide an environment in which the parties can communicate constructively with each other and assist the parties in overcoming obstacles to settlement.

**Settlement Judge.** An administrative judge (or EBCA hearing officer) who is appointed by the Chair of the EBCA for the purpose of assisting the parties in reaching a settlement. The settlement judge will not hear or have any formal or informal decision-making authority in the case, but can promote settlement through frank, in-depth discussion of the strengths and weaknesses of each party's position. The agenda for meetings will be flexible to accommodate the requirements of the individual case. The settlement judge may meet either jointly or separately with the parties to further the settlement effort. Settlement judges' recommendations are not binding on the parties. If a dispute or appeal to the EBCA is not resolved through use of

the settlement judge, it will be restored to the EBCA docket. This process is also available at General Services Board of Contract Appeals (GSBCA) and many other tribunals, including the Federal Claims Court.

## FEDERAL SUPPLY SCHEDULE CONTRACTING



### Strategic Acquisition Transactions: *A Guide for Using Federal Supply Schedules; Multiple Award Contracts; and Government-wide Agency Contracts*

August 2004

*“... In your continuing role as business advisors, we recognize that procurement is not just following rules and regulations. Rather, it is a process of making sound business decisions. Today we have new rules and operate in a different kind of environment. Your task now is to implement these new tools and develop efficient acquisition strategies ...”*

*- Excerpt from GSA's Multiple Award Schedules Program  
Owner's Manual*

## Introduction

The most important step in the acquisition process is selecting and developing the acquisition strategy. A primary goal in selecting an acquisition strategy is to minimize the time and cost of satisfying an identified need, consistent with common sense and sound business practices.

Over the past decade, the acquisition environment has experienced dramatic change as a result of legislative and regulatory reforms. These changes have led to the introduction of new and innovative acquisition methodologies that afford the acquisition community unprecedented flexibility in the manner in which goods and services can be acquired. More specifically, the ever increasing universe of goods and services that are available under the General Services Administration's Multiple Award Schedules program, and the new acquisition strategies for acquiring services via Multiple-Award Contracts and Government-wide Acquisition Contracts, provide contracting professionals and their clients practical strategic alternatives to more costly and time-consuming traditional approaches.

In lieu of overly prescriptive rules and regulations, these new methodologies rely heavily on the exercise of sound business judgment and the principles that ensure the integrity and fairness of the Federal acquisition system. However, the lack of specific procedural requirements has led to some uncertainty within the acquisition community regarding the most effective means to exercise this new discretionary authority, as well as inconsistencies in the manner in which these new strategies have been employed from agency to agency, and even within agencies. In some cases, these uncertainties and inconsistencies have resulted in increased Congressional scrutiny, or have been resolved by judicial fora, such as the General Accounting Office and Boards of Contract Appeals.

Accordingly, this *Strategic Acquisition Transactions Guide* has been developed as a tool to assist acquisition professionals and their clients through the process of identifying, analyzing and choosing among the available alternatives. Moreover, the *Guide* highlights lessons learned and provides information on best practices that is intended to ensure a level of uniformity and consistency to eliminate or mitigate some of the "growing-pains" that have been encountered thus far in using these strategies (e.g., protests, poor quality goods or services).

Consistent with the principles of continuous learning and improvement, this *Guide* is a "living" document. The *Guide* will be periodically updated to provide new information and guidance as issues arise, and to share additional best practices as they are identified.

John R. Bashista, Director  
Office of Headquarters Procurement Services

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## Part I - Federal Supply Schedules (FSS)

### What is a Federal Supply Schedule?

Federal Supply Schedules (FSS), also known as Multiple Award Schedules (MAS), are listings of vendors awarded contracts for supplies or services by the General Services Administration (GSA). These schedules are available for use by any Federal agency requiring the identified supplies or services. There are also specialized schedules, such as the Management, Organizational and Business Improvement Services (MOBIS) schedule, the Professional Engineering Services schedule, the Information Technology schedule and the Environmental Services and Products schedule, that allow procuring activities to focus their selection of contractors to special areas of interest.

In a competitive procurement process, the GSA awards schedule contracts to commercial firms that give the Government the same or better discounts than they give their best customers. These discounts are then passed on to other agencies through the various FSS schedules. This program mirrors commercial buying practices more than any other procurement process in the Federal Government, and offers federal agencies a simplified process for getting their required products and services at volume buying prices.

### Why should you use the FSS?

Advantages of using the FSS include -

- Significantly reduced acquisition time.

- GSA has already complied with competition requirements.

- Pre-solicitation and pre-award requirements like the synopsis, the Service Contract Act review, the Small Business/Labor Set-Aside review, and

- Equal Employment Opportunity review have already been performed by GSA.

- Volume purchase prices that are fair and reasonable.

- Quick delivery.

- Schedule orders count toward small business goals.

- Access to state-of-the-art technology and quality services and products.

- Compliance with environmental requirements for applicable services and products.

- Agencies can establish Blanket Purchase Agreements (BPA) for recurring needs.

### What does the "Maximum Order Threshold" of a schedule tell you?

Each schedule in the FSS has an identified *maximum order threshold*.

This threshold is not meant to limit the amount of your purchase, but represents the level at which you could benefit from better pricing. This threshold is the trigger point for you to seek additional price reductions from the schedule vendor. Vendors can therefore accept any size order, reducing the need for you to conduct duplicative and repetitive procurements for items/services already under order. When asked about further reductions, FSS contractors may either offer you a lower price, offer you the current price, or decline your order.

This threshold is also the point at which you should consider or solicit, as appropriate, more than



three FSS vendors for your required supplies or services.

*Best Practice* - Regardless of the value of the order you should:

- Always seek a price reduction from FSS vendors; and
- Consider or solicit more than three schedule vendors to improve the competitive nature of the purchase.

**Must agencies conduct Procurement Planning and Market Research before using an FSS contract?**

Not necessarily. As a general rule, obtaining information from the FSS program and FSS vendors themselves is sufficient to satisfy the agency's obligations to conduct procurement planning and market research. However, be sure you select the most appropriate schedule for your program's requirement. For instance, don't use the MOBIS schedule if professional engineering services are required.

**What services are available through the FSS?**

FSS schedules are categorized by the type of product or services available. Some of the particular types of FSS schedules are -

- Engineering services - including planning, design, integration and testing.
- Financial services - including auditing, management and reporting.
- Environmental advisory services - including planning, compliance, and waste management.
- Energy management services.
- Management and organizational improvement services.
- Document and records management services.
- Personal property management services.
- Information technology services.
- Travel and Transportation services.
- Marketing, media, and public information services.
- Laboratory, scientific and medical services and products.
- Language services.
- Vehicle acquisition and leasing services.

**How do you place Orders for Services under the FSS?**

The ordering procedure that you use depends on whether or not the type of services you are acquiring requires a Statement of Work (SOW), as well as the dollar amount of your order.

Procedures for services that require a SOW (e.g., professional services based on hourly rates) -

For purchases at or below the micro-purchase threshold of \$2,500, you can place orders directly with any FSS contractor that best meets your needs.

For purchases over the micro-purchase threshold of \$2,500, but under the Maximum Order Threshold, you need to send a Request for Quotes (RFQ), including the SOW, to a minimum of three schedule contractors, conduct an evaluation of offers, and then make a "Best Value" selection.

For services over a specific schedule's Maximum Order Threshold, you must solicit more than 3 schedule contractors and seek price reductions to determine the Best Value selection.

Procedures for services that do not require a SOW (e.g., services that are priced on a firm-fixed-price basis for a specific task, such as transcription services, printing and binding services) -

For purchases at or below the micro-purchase threshold of \$2,500, you can place orders directly with any FSS contractor that best meets your needs.

For purchases over the micro-purchase threshold of \$2,500, but under the Maximum Order Threshold, you need to review the GSA Advantage online electronic ordering system, then make a Best Value determination, or review 3 schedule contractor price lists and select the Best Value.

For services over a specific schedule's Maximum Order Threshold, you must review more than 3 schedule contractor price lists and seek price reductions to determine the Best Value selection.

Attachments A and B to this Guide include GSA's detailed ordering procedures for both services and supplies. You can also find this information at GSA's website

[http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8106&contentType=GSA\\_OVERVIEW](http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8106&contentType=GSA_OVERVIEW)

**What must be included in a Request for Quotes for services?**

For professional services based on hourly rates, you must prepare an RFQ that includes a *performance-based* description of the work you want performed.

Include the basis of award (e.g., how the vendor's technical qualifications will be determined, the use of past performance/experience information, price).

GSA also encourages you to request oral presentations from the contractors when appropriate.

You may use incentive or award fee arrangements only if the schedule's terms allow it, and a fixed-price order is issued.

**Can you obtain discounts from the established FSS pricing when acquiring services?**

As stated previously, you should always attempt to obtain price discounts, regardless of the amount of the order. However, when exceeding the Maximum Order Threshold identified in individual schedules, you must solicit price discounts from the vendors.

When acquiring services via the issuance of an RFQ, rather than requesting one discount rate for all labor categories, you should request the vendors to propose discounts by individual labor category. This will allow vendors the opportunity to propose varying discounts across the different labor categories. Frequently, you can obtain larger price discounts on the higher priced labor categories.

When teaming arrangements are proposed, each Schedule contractor should be required to propose their individual labor category rates and individual discount rates. Quotes that offer an average discount rate for all team members may not result in the greatest savings for the Government. Additionally, FSS contracts require team members to propose only their own rates and, therefore, may discount only their own prices.

### **What about supplies on the FSS?**

The FSS offers many categories of products for federal agencies to buy, including:

- Office supplies.
- Paper products.
- Furniture.
- Office equipment.
- Scientific equipment.
- Hardware, tools and appliances.
- Information technology products.
- Software.
- Copying equipment and supplies.
- Telecommunications equipment.

### **How do you place orders for supplies under the FSS?**

The ordering procedure that you use under the FSS schedules depends on the dollar amount of the supplies you are acquiring, as follows -

For purchases at or below the micro-purchase threshold of \$2,500, you can place orders directly with any FSS contractor that meets your needs.

For supplies over the micro-purchase threshold of \$2,500, but under the Maximum Order Threshold, you need to review a minimum of three price lists to select the "Best Value" taking into consideration price plus administrative costs.

For supplies over a specific schedule's Maximum Order Threshold, you must review more than 3 price lists to determine the Best Value. At this threshold, GSA's procedures require you to seek additional price reductions from the vendors. Regardless of whether the acquisition will be at or above the Maximum Order Threshold, you should always seek price reductions from vendors.

In repetitive buys, you should attempt to vary the contractor and price lists selected. A selection based on the Best Value means that you consider factors other than just the lowest price in determining which contractor receives your order. These other factors may include criteria such as past performance, probable life, warranty, environmental and energy efficiency considerations, maintenance availability, technical qualifications, and trade-in considerations. (Best Value considerations are discussed in more detail below.)

**Do orders for supplies also require a statement of work?**

No. Statements of Work are not required to be developed for the purchase of products under the FSS. Neither are an RFQ or evaluation factors. When ordering products over \$2,500, the Contracting Officer is required to either -

Review the GSA Advantage online shopping service and make a best value determination.

Or, review 3 Schedule contractors' price lists (more than 3 if the order will exceed the Maximum Order Threshold), select the best value, and place the order directly with the Schedule contractor.

**Are there any other special ordering procedures?**

Yes. FAR 8.402 contemplates that GSA may occasionally find it necessary to establish special ordering procedures for individual Schedules, or, for some Special Item Numbers (SINs) within a Schedule. You can find these special ordering procedures in the individual affected schedules.

One example of a schedule that contains unique ordering procedures is Schedule #70 for Information Technology (IT) Professional Services. When procuring IT services under SIN 132-51, for instance, you are allowed to reserve the order for award to only small business concerns.

Additionally, FAR 8.404(c) outlines the ordering procedures you must follow for mandatory use schedules. These schedules do not allow certain agencies to test the market solely for the purpose of seeking alternative sources to the FSS program. Presently, DOE is not required to use any of the mandatory FSS schedules.

As previously addressed, GSA has also established special ordering procedures for services that require a Statement of Work. These special ordering procedures take precedence over the procedures in FAR 8.404(b)(2) through (b)(3). Attachment A outlines these ordering procedures for services.

A contracting officer placing an order on another agency's behalf is responsible for applying that agency's regulatory and statutory requirements and the requiring activity is required to provide information on the applicable regulatory and statutory requirements to the contracting officer.

**Can you place multiple awards under the FSS?**

No, but GSA does encourage agencies to establish blanket purchase agreements (BPA) under FSS schedules when an agency needs a simplified method for filling anticipated repetitive needs for services or supplies. BPAs are actually a type of an account established with Schedule

contractors to allow agencies to leverage their buying power. Based upon the potential volume of sales, Schedule contractors may offer increased discounts over the prices identified in their FSS contracts. If you do pursue a BPA, remember that -

- Prices must be compared among at least three schedule vendors (more than three if the total value of the order is expected to exceed the Maximum Order Threshold) before issuing a BPA.
- All BPA-holders must be given an opportunity to submit a quote whenever a requirement arises.
- BPAs generally should not exceed five years in length, but may do so to meet program requirements. Contractors may be awarded BPAs that extend beyond the current term of their GSA Schedule contract, so long as there are option periods in their GSA Schedule contract that, if exercised, will cover the BPA's period of performance.
- The ordering activity that established the BPA shall review it at least once a year to determine whether the schedule contract, upon which the BPA was established, is still in effect; the BPA represents the best value; and estimated quantities/amounts have been exceeded and additional price reductions can be obtained. The ordering activity shall document the results of its review.

You can find a sample BPA on the GSA website

[http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8106&contentType=GSA\\_OVERVIEW](http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8106&contentType=GSA_OVERVIEW)

### **Can you buy products or services that are not identified on a particular schedule?**

Yes, but only with certain restrictions. According to FAR 8.401(d), you may add items that are not included on the schedule contract, called *open market items*, to an FSS BPA or an individual task/delivery order only if -

- All applicable FAR regulations pertaining to the purchase of the items that are not on the Schedule have been followed, including publicizing (FAR Part 5), competition (FAR Part 6), commercial items (FAR Part 12), contracting methods (FAR Parts 13, 14, and 15), and small business programs (FAR Part 19).
- The Contracting Officer has determined the price for the items that are not on the FSS is fair and reasonable.
- The items are clearly labeled on the order as items that are not on the FSS.
- All clauses that are applicable to the items that are not on the FSS are included in the order.

### **Are teaming partners all required to be FSS contractors?**

Yes. To ensure that agencies receive the streamlining advantages of the FSS program, all

teaming partners and subcontractors must be FSS contractors.

**Do FAR Part 15 requirements apply to FSS orders?**

No. But GAO has stated that where an agency conducts a competition under the MAS Program, it will review the agency's actions to ensure that the evaluation was reasonable and consistent with the terms of the solicitation (i.e., the RFQ). When GAO does review an agency's actions, it tends to look at the agency's use of competitive procedures, and whether the agency's evaluation and award process is consistent with the RFQ.

*The simple rule is - you should not use the formal FAR Part 15 competitive negotiated process, or anything similar to it, when buying under the MAS program.*

If you do adopt FAR Part 15 procedures when placing an FSS order, GAO will likely consider any protest actions in light of the FAR Part 15 requirements, as well as its own previous decisions on competitive negotiated acquisitions.

**Must agencies consider alternative offers from vendors that do not have an FSS contract?**

No. The GAO has repeatedly found that, when an agency intends to acquire products or services under the MAS Program, that agency is not required to consider products or services that are offered by contractors that are not available under an FSS contract.

**Do you need to "equalize" information gathering, or be concerned with equal treatment of vendors being considered for FSS orders?**

No. While all potential offerors should certainly be treated fairly, the GAO has found that agencies may properly place an Order under the MAS Program without meeting any of the statutory and regulatory requirements associated with conducting a negotiated, competitive procurement. So, you need not engage in "equal interactions" with FSS vendors, nor must you equalize the information gathering process among FSS vendors.

You may have further "interactions" with offerors prior to award of an FSS order to solicit clarifying information from one or more vendors. You can also solicit such information from only one vendor without affording another FSS vendor a similar opportunity if there is no basis to do so.

You should, however, be careful to ensure that such further interactions do not enter the realm of holding "discussions," as that term is used in FAR 15.306(d). Such interactions should not be undertaken with the intent of allowing offerors to revise their proposals (e.g. do not advise vendors of weaknesses in their technical proposal or enter into negotiations that would result in revisions of its proposals, permitting an offeror to improve its standing in the evaluation).

Further interactions with vendors should be conducted for the purposes of permitting vendors an opportunity to clarify any ambiguities or inconsistencies found in one or more parts of its proposal/quotation, so that the agency can make a clear and objective evaluation.

**Can you award a Sole Source Order under the MAS Program?**

Orders placed under Federal Supply Schedules are exempt from the requirements in FAR Part 6. However, ordering activities shall procure sole source requirements only if the need to do so is justified in writing and approved at the levels specified at FAR 8.405-6(b).

Although the products/services that are available under the MAS program are considered commercial, you must ensure that the Government's requirements are not unduly restrictive and that the minimum salient characteristics of the products/services being acquired are necessary and justified.

**Can an agency count awards under the MAS to small business concerns toward agency socioeconomic goals?**

Yes. Awards to FSS vendors which fall into the various socioeconomic groups may be reported against an agency's annual socioeconomic accomplishments. However, for purposes of reporting an order placed with a small business schedule contractor, an ordering agency may only take credit if the awardee meets a size standard that corresponds to the work performed. Ordering activities should rely on the small business representations made by schedule contractors at the contract level.

**How can you maximize opportunities for Small Businesses under the MAS?**

FAR Parts 8 and 38 prescribe that small businesses holding contracts under the FSS program are to be afforded the maximum practicable opportunity to compete for, and receive, orders. This FAR guidance encourages Contracting Officers to consider the availability of small business concerns when planning for FSS acquisitions and placing FSS orders.

DOE Acquisition Letters 2000-02 and 2001-05 set forth Departmental policy addressing small business programs and strategies for maximizing contracting opportunities for small businesses.

AL 2000-02 requires Contracting Officers to maximize the award of purchases to those small businesses holding contracts with the FSS. Contracting Officers are required to target FSS order competitions to small business firms, and must coordinate with program offices to identify three or more small businesses that hold relevant FSS contracts. FSS order competitions should be further limited, when appropriate, to specific socio-economic categories of small businesses, such as woman-owned or small disadvantaged businesses.

When necessary, program and procurement personnel should coordinate with DOE's Office of Economic Impact and Diversity (ED) and SBA representatives to identify responsible and qualified small businesses for their services and supplies requirements.

The SBA and GSA have teamed to further help small businesses participating in SBA's 8(a) Business Development program to become more competitive and more profitable. This partnership agreement, originally signed in June 2000, is a joint effort by both SBA and the GSA to increase participation of 8(a) firms in the FSS program, boost the number of contract dollars awarded to 8(a) firms, and allow Federal agencies to count the awards given to 8(a) firms toward their own 8(a) goals.

Orders placed under GSA's FSS schedules to small businesses are counted as DOE accomplishments for its socioeconomic contract goaling purposes. Contracting Officers should actively assist their program customers in identifying vendors that will help meet the program's procurement requirements.

The integration of PRO-Net and DOD's Central Contractor Registration (CCR) databases has created one portal for entering and searching small business sources. This integration assists small businesses with marketing their goods and services to the federal government.

<http://www.ccr.gov/>

### **Is it appropriate to set-aside an Order under the MAS for Small Businesses?**

No - it is neither appropriate nor necessary. FAR Part 19 does not apply to FSS orders, therefore set-aside requirements are not appropriate. However, certain GSA schedules allow orders to be reserved exclusively for small business vendors under the schedule. Moreover, if FAR Part 19 procedures or provisions are used, such as the limitation on subcontracting, incorporation of NAICS codes, or request for small business representation, the Small Business Administration (SBA) will likely view the transaction as a set-aside. This practice would open up the deal for a potential size protest under which SBA would take jurisdiction.

When selecting only small business contractors for potential award of an FSS order, you should -

- Rely on size certifications made by the contractor to GSA at award of the FSS contract.
- Rely on the NAICS code identified in the GSA FSS contract.
- Not include a NAICS code in an FSS Order.
- Not use the term "small business set-aside" in the RFQ.
- Not use set-aside provisions or clauses in the RFQ or contract.
- Not do anything that may imply the order is a formal small business set-aside.

### **How can you ensure that an order placed with a small business prime is not a "pass-through" for large business subcontractors?**

GSA is responsible for administering the FSS contracts to ensure that the majority of the work that is performed by a small business vendor is accomplished over all of their orders, not just a single order.

Notwithstanding that neither GSA's procedures nor a vendor's contract require that an FSS small business contractor perform 51% of the work on individual orders to preclude a pass through of funds from small business contractors to large business contractors, you may include a requirement that the small business prime contractor make its best effort to accomplish the majority of the work on individual orders. A valuable tool would be the use of an evaluation criterion defining the amount of small business participation that the vendor must commit to.

A model clause you may use to accomplish this is -

#### Principal Performance of the Effort

To ensure technical efficiency and accountability in the performance of this task order, at



least fifty-one percent of the total price paid under this task order (excluding the amount paid for other direct costs) shall be paid for work performed by the employees of the prime contractor.”

In lieu of specifying a minimum percentage, you may wish to adjectivally describe a minimal level of performance by the prime (e.g., ...a majority of the total price...).

### **Do you need to get Representations and Certifications from FSS contractors?**

No. Contractor Representations and Certifications have already been received and reviewed by GSA during the competitive process prior to awarding FSS contracts. However, agency-specific Representations and Certifications may need to be obtained for agency-specific requirements such as Facility Clearance/Foreign Ownership, Control or Influence over Contractors, and Organizational Conflicts of Interest.

### **Can companies without an MAS Contract protest an agency's decision to use the FSS Program ?**

No. GAO has held that a protestor who does not have an FSS contract is not an interested party, and therefore, does not have standing to challenge an agency's determination to use the MAS program.

### **Can an incumbent contractor, previously awarded an order under the MAS program, protest its exclusion from a follow-on competition?**

No. The ordering agency determines which vendor sources are solicited. In a U.S. Court of Federal Claims decision (48 Fed. Cl. 638, filed February 14, 2001, Cybertech Group, Inc. v. the U.S. and Intellidyne), the court concluded that the Government was under no obligation to solicit an incumbent contractor. The court's decision states, in part, *“plaintiff has been unable to cite any regulation, statutory provision, or applicable precedent requiring an incumbent to be solicited on delivery orders from an FSS schedule contract.”*

### **How does a “Best Value” Selection work under the MAS Program?**

A best value selection is a process used to select services or products that best meet the buyer's need. A best value selection trades off price and other evaluation factors such as past performance, understanding the requirement, technical qualifications, trade-in considerations, warranty, and environmental and energy efficient considerations, if applicable. In a best value selection, low price does not necessarily assure selection.

In following the procedures set forth in FAR Subpart 8.4, GSA's MAS Program owners manual, and schedule-specific ordering procedures to place orders under the MAS program, Contracting Officers should consider the following in making Best Value selections -

- The basis on which an agency will make its selection must be identified in the RFQ.
- Use oral presentations in lieu of written proposals to maximum extent practicable.

- Evaluation criteria should be kept to the minimum necessary to objectively evaluate a contractor's ability to successfully fulfill the government's stated requirements.
- Formal rating plans are not required, but in certain circumstances may be helpful to ensure consistency with the evaluation factors for award that are stated in the RFQ.
- Contractor quotations need not be point scored.

### **What Best Value criteria can you use when ordering services?**

The following are sample best value criteria which may be used for ordering services off the FSS

- *Understanding the requirement* - To what extent does the contractor's technical approach demonstrate full understanding of the effort to be performed under the task?
- *Quality of performance/past performance* - To what extent did the contractor demonstrate compliance with prior contract requirements for similar work and scope, accuracy of reports, timely delivery, and technical excellence?
- *Cost performance* - To what extent did the contractor perform within or below cost on past similar requirements?
- *Schedule performance* - To what extent did the contractor meet milestones, was responsive to technical direction, and completed services on time and in accordance with established schedules?
- *Business relations* - To what extent is the contractor flexible, cooperative, proactive, and committed to customer satisfaction?

### **Should "Key" Personnel be evaluated when placing an Order for Services?**

Yes, when certain personnel are considered critical to the success of the project. Key Personnel may be evaluated, for both the prime contractor and subcontractors/team members. Examples of efforts requiring the identification of Key Personnel may include: the Program Manager and Quality Assurance Engineer developing Environmental Impact Statements; and, the Senior Nuclear Engineer conducting and managing research studies.

### **How is price evaluated in a Best Value Selection when acquiring services?**

For requirements in excess of the micro-purchase threshold, the Contracting Officer should document the evaluation of the vendor's price quotations that formed the basis for the selection, and document the rationale for any trade-offs in making the selection.

While you may rely on GSA's determination that the fixed hourly rates on a schedule contract are fair and reasonable, GSA has not determined that the level of effort or mix of labor proposed in response to a specific requirement are adequate and appropriate, nor that they represent the best value.

Relying on the predetermined reasonableness of an FSS vendor's labor rates alone does not provide an adequate basis for determining which vendor is the most competitive since it does not reflect the full cost of the potential Order, or critical aspects of the services offered, such as the level of effort and the skill mix of labor required to complete the work.

When using a performance-based SOW, you should generally avoid dictating the number of labor hours and skill mix against which FSS vendors should propose. Rather, vendors should be permitted to propose the labor skill mix and the level of effort (LOE) it considers necessary against the performance-based SOW. In selecting the contractor which offers the best value and the lowest cost alternative to meet the department's needs, the Contracting Officer should evaluate the vendor's proposed skill mix and LOE.

**What level of detail is required to document a Best Value selection under the MAS Program?**

You should document the files sufficiently to demonstrate that your evaluation of the vendor's response to an RFQ was reasonable and in accordance with the criteria outlined in the RFQ. The extent of the documentation is largely dependent upon the size, scope and complexity of the acquisition.

There is no requirement that you quantify a cost/technical tradeoff in dollars.

Agencies should use whatever evaluation approach, such as narrative or adjectival ratings, that are appropriate to the acquisition bearing in mind the intended streamlined nature of the FSS process.

Attachment C illustrates a sample selection statement.

**Are FSS vendors entitled to a debriefing at any time before or following the placement of a competitive order under the MAS Program?**

As stated above, the statutory/regulatory requirements associated with competitive negotiated acquisitions in FAR Part 15, do not apply to orders placed against an FSS contract. However, if an unsuccessful offer requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the award decision shall be provided. It may be in the Department's best interest to provide an unsuccessful FSS vendor information about the evaluation of the vendor's offer (e.g., to avoid a potential protest; provide the vendor relevant information that may improve its competitive capabilities for future DOE requirements).

While not required, the Contracting Officer may, at his/her sole discretion, elect to provide additional information to an unsuccessful FSS vendor(s). When electing to do so, the Contracting officer should consider the following -

- The timing for conducting such interactions are at the convenience of the agency, but should be conducted after the award of an order.
- Such post-award interactions may be conducted in whatever format is considered appropriate by the Contracting Officer (i.e., in writing, face-to-face, or via telephone).

- The level of information conveyed is at the discretion of the Contracting Officer and should be limited to that necessary for the vendor to understand why it wasn't selected for the Order. As stated above, such interactions need not comply with the requirements set forth in FAR 15 pertaining to the debriefing of unsuccessful offerors.

You should consult with your procurement attorney about your planned approach.

A best practice that has been successful on prior FSS acquisitions has been to communicate relevant information regarding the Government's evaluation of an unsuccessful FSS vendor's proposal, in writing, when providing notice to a vendor that it was not the successful offeror. Information may include the following:

Name and address of the successful FSS vendor.

Total award value for the Order.

The basis for award to the successful FSS vendor (e.g., lowest priced-technically acceptable offer).

Although not required, if quotes are rated during the evaluation, include the unsuccessful offeror's rating.

A summary of the unsuccessful vendor's evaluated strengths and weaknesses.

Information that is provided should relate only to the successful FSS vendor and the unsuccessful FSS vendor receiving the notice. That is, do not include technical ratings or evaluated prices for any other unsuccessful FSS vendor(s). However, you may elect to identify the relative ranking of the unsuccessful FSS vendor's evaluated technical rating and price (e.g., third highest technical score and highest evaluated price).

### **What is "Scope Creep?"**

Task Orders are awarded for a specific pre-determined and authorized effort to be performed by the contractor. "*Scope creep*" refers to an undesired and unauthorized expansion of the scope of work under a task order. For example, if the scope of work for an Order were for environmental restoration work, expanding the work to include fossil energy support services would be considered scope creep, and not authorized.

### **What happens if the FSS Contractor doesn't perform adequately?**

The GSA's FSS contracts include the same termination provisions that are prescribed in FAR Part 12.

If a contractor delivers a supply or service, but it does not conform to the order requirements, the ordering activity shall take appropriate action in accordance with the inspection and acceptance clause of the contract, as supplemented by the order. If the contractor fails to perform an order, or take appropriate corrective action, the ordering activity may terminate the order for cause or modify the order to establish a new delivery date (after obtaining consideration as appropriate).

As an alternative to terminating an order, the Contracting Officer may elect to not exercise any remaining options under the order.

## Part II - Multiple Award Contracts

### What is a Multiple Award Contract?

A multiple award contract is a type of indefinite quantity contract which is awarded to several contractors from a single solicitation. Delivery of supplies, or performance of services, is then made via an individual Order placed with one of the contractors pursuant to procedures established in the contract. All contractors receiving awards under a solicitation are given a fair opportunity to be considered for each task/delivery Order issued during the life of the contract.

FAR Subpart 16.5 provides the regulatory procedures and guidance regarding the award and administration of multiple award contracts.

### What are the benefits of using Multiple Award Contracts?

Multiple award contracts offer many advantages that result in more efficient and effective buying of recurring supplies and services, including:

- Streamlining the awarding and Ordering process.
- Ensuring fast delivery of the required products/services.
- Allowing the Government to leverage its buying power to get best value, to receive high quality goods and services, and to take advantage of latest technological changes in the marketplace.
- Streamlining the Order closeout process.

### When should you use multiple award contracts?

The FAR requires you to make multiple awards for recurring supplies and services *to the maximum extent practicable*.

For advisory and assistance services, you are *required* to make multiple awards if the amount of the services exceeds \$10,000,000 and the period of performance will exceed three years.

Proper advance planning and market research will help you make appropriate decisions regarding when to use multiple awards, as well as when multiple awards are not appropriate. FAR 16.504(c) identifies several conditions when you should not use multiple award contracting methods. Some of the factors to be considered in making these decisions include:

- Complexity of the requirement.
- Duration of the effort.
- Required resources.
- Ability to achieve and maintain the competitive nature of a multiple award contract among awardees throughout the period of performance.

Before pursuing multiple awards, ensure that there are two or more contractors that are capable of performing the required work. If you were to make awards to contractors that only specialize in certain areas of the requirement, the competitive nature of such contracts in the placement of Orders after contract award would be impaired.

Be sure to document the contract file with your rationale for the decisions you make in planning for and awarding multiple award contracts, or, conversely, when multiple awards are determined not to be appropriate.

### **What is fair opportunity?**

"Fair opportunity" does not mean "competition" as that term is used in FAR Part 6. The concept of providing fair opportunity for all multiple award contractors refers to your responsibility as the Contracting Officer to ensure that once a multiple award contract is awarded, each contractor is given an opportunity to receive every Order that exceeds \$2,500 that is issued under the multiple award contract.

### **How do you establish Ordering procedures that provide for "Fair Opportunity"?**

Solicitations and contracts for multiple awards must state the procedures and selection criteria that you will use to give awardees a fair opportunity to be considered for each Order. You have broad discretion in developing appropriate Order placement procedures, and you should use streamlined procedures, including oral presentations and minimal information submission requirements as you determine are necessary.

FAR 16.505(b) prescribes requirements and guidelines you should follow for developing Ordering procedures.

Attachment D illustrates a sample multiple award Ordering clause that establishes procedures for providing each awardee "fair opportunity".

### **How do you ensure that fair opportunity is provided to all contractors?**

Contracting Officers can ensure that fair opportunity exists for all awardees and still keep the multiple award process simple and streamlined by following these guidelines -

Ensure that requiring program customers fully understand the concept of fair opportunity and their role in ensuring that it is achieved for each Order (e.g., evaluating contractor capabilities pursuant to the established Ordering procedures). This is done through proper advance planning and adequate documentation of the decisions made in the award of multiple contracts and in the issuance of task/delivery Orders thereunder.

Avoid using Ordering practices that preclude fair opportunity - such as the *allocation of Orders among awardees*, and the *direction of Orders to preferred awardees*. These practices are prohibited and result in less than fair consideration being given to all awardees under a multiple award contract.

Clearly spell out the entire Ordering process in the solicitation and contract.

Document the file for each Order to evidence that your Ordering practices adhere to the Ordering procedures set forth in the contract.

Inform all awardees if you plan to use an exception to fair opportunity that may occur in the

placement of an Order.

Issue follow-on/add-on Orders only when they constitute a logical follow-on, provided that all awardees were given a fair opportunity to be considered for the original Order.

Maximize the use of firm-fixed-price Orders.

Keep in mind that formal evaluation plans and the scoring of quotes/offers is not required.

**What do you need to consider in placing Orders under a multiple award contract for services?**

Each Order must clearly describe all services to be performed so that the total cost or price of performance can be established.

Use performance-based work statements to the maximum extent practicable.

Keep contractor submission requirements (e.g., task Order proposals) to a minimum.

At a minimum, the following should be considered when making a selection for the issuance of an Order -

- Past performance on earlier Orders under the contract, including quality, timeliness, and cost control.
- Potential impact on other Orders placed with the contractor (i.e., potential impacts on the contractor's resources).
- Minimum Ordering requirements of the contract.
- The amount of time contractors will need to make an informed business decision on whether to respond to potential Orders.
- Whether contractors could be encouraged to respond to potential Orders by performing outreach intended to promote exchanges of information (e.g., request comments on draft work statements).
- Price or cost.

The basis for selection of an awardee for individual task Orders can be based on Best Value or Low Cost/Technically Acceptable depending on the complexity of the requirement and the needs of the program. The basis for selection is usually specified in the request for task Order but could also be specified in the multiple award contract.

**How is price evaluated in awarding a multiple award contract?**

Although final pricing of supplies or services is not determined until Orders are issued, you are still required to consider cost to the Government in the initial evaluation of offers leading to the



award of multiple contracts. The Comptroller General has reiterated that competitive solicitations must include cost or price to the Government as an evaluation factor, and you must consider cost or price to the Government in evaluating competitive proposals, even for multiple award contracts.

You can not eliminate proposals from consideration for award of a contract without taking into account the relative cost of that proposal to the Government. This is a statutory requirement that is not satisfied by the practice of considering cost or price only after contract award, when individual task/delivery Orders are issued.

You must develop a basis upon which the evaluation of cost/price factors can be considered in the initial award of multiple contracts to assess the Government's best estimate of the likely relative cost to the Government.

For products, you can request offerors to submit fixed prices for the term of the contract, which would allow for an appropriate evaluation.

For services, you can use a combination of several approaches to provide the most comprehensive way to accomplish the required cost evaluation. Proposed labor rates and mark-up rates can be requested for evaluation purposes. Offerors may also be directed to provide a fully detailed cost proposal for a sample task Order for one or more of the services to be performed under the contract. Agency historical information that addresses similar past projects can be used to estimate the labor mix and materials. Offerors' responses to the sample task Order can provide insight into their technical and staffing approach and can therefore provide a reasonable basis to assess the relative cost of the competing proposals.

### **How are Orders priced under multiple awards?**

Orders that are placed under multiple award contracts are usually priced using both fixed price and cost reimbursement type methods, depending on the degree in which the work requirements can be specified. However, you should use firm-fixed-price Orders to the maximum extent practicable.

### **What documentation is required when placing an Order?**

For each Order issued, the contract file shall contain a record which documents the rationale for placement of the Order and cost/price of the Order. Specifically, you should document the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision.

This documentation need not quantify the tradeoffs that led to the decision.

The contract file shall also identify the basis for using an exception to the fair opportunity process. If the agency uses the logical follow-on exception, the rationale shall describe why the relationship between the initial Order and the follow-on is logical (e.g., in terms of scope, period of performance, or value).

**What should be considered in determining whether work is a logical follow-on to a previously issued Task Order?**

All awardees under the multiple award contract must have been provided a fair opportunity to receive the original Order under which the work will be added. If another authority was used to issue the original Order on a sole-source basis (e.g., to satisfy a minimum guarantee), then additional work can not be added to the original Order as a logical follow-on.

A new requirement can be added to an existing task, if the requirement is within the scope of the initial task Order and the work is not severable. For example, when a contractor is providing administrative support services to an organization and a new sub-organization is formed due to a reorganization, an additional contractor employee may be required. It would then be prudent to have the same contractor perform the work, provided the task is modified to add this requirement.

The criteria contained in FAR 6.302-1(a)(ii) can be used as a guide in determining whether additional work constitutes a logical follow-on to a previously issued task. Specifically, if the issuance of a new Order would result in a substantial duplication of costs to the Government that is not expected to be recovered through the "fair opportunity" process established for the contract, or in unacceptable delays in fulfilling the agency's requirements, then such work would be considered as an appropriate logical follow-on to the original Order.

**How can opportunities for Small Businesses be maximized under Multiple Award Contracts?**

Opportunities for maximizing the use of small businesses under multiple award contracts can be accomplished in several ways -

- A solicitation can be structured as a total set-aside where market research has indicated there will be adequate competition.
- Partial set-asides may also be appropriate.
- Opportunities can also be made available by reserving the issuance of orders under specific functional areas of the statement of work exclusively for award to small business concerns.

In an unrestricted competition, small business participation can be maximized by employing several techniques -

- Issuing a sources sought synopsis in FEDBIZOPS inviting interested small businesses to submit comprehensive capability statements for specific functional areas of the statement of work.
- Issuing a draft solicitation for industry comment.
- Breaking down functional requirements of the Statement of Work to their lowest level (e.g., subfunctional elements) to increase small business opportunities to propose against

discrete elements of a multiple award contract.

- Conducting small business outreach conferences to market a program to the small business community.
- Including provisions in the fair opportunity procedures of the solicitation/contract which permit the Contracting Officer to reserve the issuance of certain Orders among small businesses (see Attachment D, paragraph b.5.).

**What are some helpful Lessons Learned for awarding and administering multiple award contracts?**

Be sure to consider bundling issues when planning for a multiple award contract. GAO has recently decided several cases where the agency bundled requirements traditionally acquired from small businesses. Awards were made to only large companies, as small businesses were precluded from proposing effectively.

Be sure to include relevant clauses that address various contract types (i.e., Firm-Fixed- Price, Time & Material/Labor Hour, Cost Reimbursable) in the master contract if you anticipate the issuance of Task Orders on these bases.

Be pro-active. Conduct a post-award meeting with the technical team and a post-award conference with each contractor to communicate to the contractor and technical team the process of how tasks will be awarded and administered.

When Key Personnel are listed in the contract, be sure to state at the post-award conference that you will only authorize key personnel changes in advance of task proposals being submitted, if applicable.

Be sure to brief technical monitors on their roles and responsibilities as technical monitors. Also, make sure the Contracting Officer Representatives (COR) and technical monitors are informed, in writing, that they aren't authorized to have the contractor perform services outside the scope of the task unless it has been priced out and approved by the Contracting Officer via a task modification in advance of the services being performed, otherwise the action is a ratification.

The issuance of all task Orders must adhere to the Ordering procedures set forth in the contract to ensure that fair opportunity is provided to all awardees under a multiple award contract. There are very few instances when sole source task Orders/modifications are appropriate (See FAR 16.505(b)(2)).

For example, if a contractor has not received tasks sufficient to meet a minimum Ordering guarantee of the contract, an Order may be placed directly with the contractor without providing a fair opportunity to the other contractors under the multiple award contract.

It should be noted that there is no statutory or regulatory authority which permits the issuance of a sole-source Order under a multiple award contract on the basis of socioeconomic considerations (e.g., 8(a) concerns).

For individual Orders, you should include pricing for option years when the initial task Orders are awarded to help the COR and technical monitors estimate funding requirements in advance.

## Part III - Governmentwide Agency Contracts

### What is a Governmentwide Agency Contract (GWAC) ?

A Governmentwide Agency Contract (GWAC) is a multiple award contract issued by one host agency that may be used by other Federal agencies to procure information technology products and services. GWACs offer total technology solutions including hardware, software, systems integration, asset management, and security and program management.

The use of GWACs is subject to the indefinite-delivery contracts requirements prescribed in FAR Subpart 16.5. However, GWACs are not subject to the requirements and limitations of the Economy Act, as specified in FAR Subpart 17.5 - Interagency Acquisitions Under the Economy Act.

Host agencies are designated pursuant to the authority of the Director, Office of Management and Budget, to establish GWACs. Currently there are only four OMB designated GWAC agencies - GSA, National Institutes of Health, National Aeronautics and Space Administration, and the Department of Commerce.

Although DOE is not a designated GWAC agency, the Department can fully utilize GWACs that are administered by host agencies.

### Are there any limitations imposed on the user agency?

Currently, each host agency has established a maximum value for their respective GWAC which is equal to the estimated Government usage for a ten-year period.

Each GWAC has an established limitation on how much of the total contract value one agency can use. This amount varies by GWAC and is determined by the host agency, which normally adds a small administrative, or user fee to cover its cost of administering the GWAC.

### What are the advantages of using GWACs?

GWACs offer Federal agencies the advantage of flexibility in meeting their various information technology requirements through one umbrella contract. Specific advantages include -

- GWACs are administratively less burdensome than if an agency were to conduct its own series of individual procurements.
- Procuring agencies realize savings through reduced procurement and administrative costs and through volume buying pricing.
- GWACs utilize performance-based contracts focusing on outcome solutions.
- Orders against GWACs are not protestable.
- The host agency has already conducted the competition resulting in one or more contract awards to the best-in-class IT product and service providers.

- Provide the broadest availability of IT products and services.
- The ordering award process takes approximately one-fourth of the lead-time required for traditional competitive acquisitions, using FAR Part 15 procedures.
- Individual prices are based upon competition in establishing the umbrella GWAC and are predetermined to be fair and reasonable for the placement of orders.
- Small, minority and women-owned businesses, as well as large businesses are represented.
- There are no FedBizOpps posting requirements for the ordering agency.
- Task orders may be firm-fixed-price, time and material/labor hour, level of effort or cost reimbursement depending upon the specific GWAC and the nature of the work to be performed.
- There are over 60 GWACs from which an agency can choose its specific requirements. Attachment D. provides a listing of all current GWACs that have been established and are available for use by DOE and other agencies.

#### **What types of products are available on GWACs?**

Many IT products are available on GWACs, including -

- Mainframes
- Desktop computers
- Portable computers
- Hardware
- Peripherals
- Software
- Bar coding systems

#### **What services are available on GWACs?**

There are also many types of IT services available on GWACs, including -

- Hardware/Software Maintenance
- Training
- Software Application
- Digitizing
- Technical support

#### **What do user fees pay for?**

User fees are the revenue collected by the host agency to cover the costs associated with awarding and administering the stable of GWAC contracts, as well as the administrative costs of

servicing the use of the GWAC contract by other, ordering agencies.

User fees are higher for those agencies that require the host agency to award and administer the tasks issued in support of the ordering agency, while user fees are lower for those agencies willing to administer the tasks that are awarded by the host agency.

**How much are the user fees?**

User fees that are paid to the host agency normally range between .5% and 4%. However, user fees are negotiable. Some GWACs provide for annual ceilings on user fees that can result in greatly reduced aggregate fee percentages.

**For IT integration service requirements, are GWACs preferred over the FSS program?**

Yes. GWACs offer total IT solutions through performance-based contracts. If agencies and contractors are focused on the desired outcome rather than the individual pieces involved, GWAC contractors can generally deliver better service. GWACs are specifically focused on providing for outcome-oriented solutions.

**How do you ensure that the host agency complies with its commitments?**

This may be accomplished through the Interagency Agreement (IA) between the host agency and user agency and an accompanying memorandum of understanding (MOU) between the two agencies. The IA/MOU should detail the performance expectations of the two agencies. The IA/MOU may be negotiated to provide for a reduction in the fee paid to the host agency, in the event that the expectations committed to by the host agency are not maintained.

## References

As this Guide will be published in an electronic format,  
the attached references will be available via electronic links.

### REFERENCE DOCUMENTS

Doing Business with GSA

GSA Multiple Award Schedules Program Owners Manual (Spring 2001)

GSA Information Technology Acquisition Center Group To Information Technology  
Multiple Award Schedule

GSA Federal Supply Schedules Briefing Prepared by Jeffrey Rubenstein U.S. Department of Energy  
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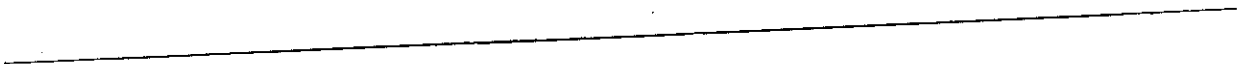
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Article -Army, AF Buyers Urged to Use Own Contracts

***Strategic Acquisition Transactions Guide***

**Attachment A**

**Ordering Procedures for Services  
(Services that Require a Statement of Work)**



**Ordering Procedures for Services**  
**(Services that Require a Statement of Work)**

GSA developed these special instructions for ordering services when a Statement of Work is required. FAR 8.402 contemplates that GSA may occasionally find it necessary to establish special ordering procedures for individual Schedules or for some Special Item Numbers (SINs) within a Schedule. These procedures take precedence over the procedures in FAR 8.404(b)(2) through (b)(3) [www.arnet.gov/far](http://www.arnet.gov/far). GSA has determined that the rates for services contained in the contractor's price list are fair and reasonable. However, if you are using these Schedule contracts, you are still responsible for:

- considering the level of effort and mix of labor proposed to perform a specific task being ordered
- making a determination that the total firm-fixed price or ceiling price is fair and reasonable

Based on quotes requested from three Schedule contractors that appear to offer the Best Value (considering scope of services offered, hourly rates, contractor's locations, and other factors, as appropriate), you are instructed to select the one that best meets your needs.

When ordering services, ordering offices shall -

- Prepare a Request for Quotes (RFQ)
  - Transmit the RFQ to Schedule contractors
  - Evaluate quotes and select the Schedule contractor to receive the order.
-

➡ **Prepare a Request for Quotes (RFQ)**

At a minimum, prepare a performance-based statement of work that outlines, the work to be performed

- location of work
- period of performance
- deliverables
- applicable standards
- acceptance criteria, and any special requirements (i.e., security clearances, travel, special knowledge, etc.).

Prepare an RFQ which includes the performance-based statement of work and requests the Schedule contractors to submit either a firm-fixed price or a ceiling price to provide the services outlined in the statement of work.

A firm-fixed price order shall be requested, unless the buying member makes a determination that it is not possible at the time of placing the order to estimate accurately the extent or duration of the work or to anticipate cost with any reasonable degree of confidence. When such a determination is made, a labor hour or time-and-materials proposal may be requested.

The firm-fixed price shall be based on the hourly rates in the Schedule contract and shall consider the mix of labor categories and level of effort required to perform the services described in the statement of work.

The firm-fixed price of the order should also include any travel costs or other incidental costs related to performance of the services ordered, unless the order provides for reimbursement of travel costs at the rates provided in the Federal Travel or Joint Travel Regulations.

A ceiling price must be established for labor-hour and time-and-materials orders.

The RFQ may request the Schedule contractors, if necessary or appropriate, to submit a project plan for performing the task and information on the Schedule contractor's experience and/or past performance performing similar tasks.

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## ***Strategic Acquisition Transactions Guide***

The RFQ shall notify the Schedule contractors what basis will be used for selecting the Schedule contractor to receive the order.

The notice shall include the basis for determining whether the Schedule Contractors are technically qualified and provide an explanation regarding the intended use of any experience and/or past performance information in determining technical acceptability of responses.

### **➡ Transmit the RFQ to Schedule Contractor**

- Based upon an initial evaluation of catalogs and price lists, the buying member's office should identify the Schedule contractors that appear to offer the Best Value (considering the scope of services offered, hourly rates and other factors such as Schedule contractors' locations, as appropriate).
- The RFQ should be provided to three Schedule contractors if the proposed order is estimated to exceed the micro-purchase threshold, but not exceed the maximum order threshold.

For proposed orders exceeding the maximum order threshold, the request for quotes should be provided to additional Schedule contractors that offer services that will meet the agency's needs. Buying members should strive to minimize the Schedule contractors' costs associated with responding to RFQs for specific orders.

Requests should be tailored to the minimum level necessary for adequate evaluation and selection for order placement. Oral presentations should be considered, when possible.

### **➡ Evaluate Quotes and Select the Schedule Contractor to Receive the Order**

After responses have been evaluated against the factors identified in the RFQ, the order should be placed with the Schedule contractor that represents the , Best Value and results in the lowest overall cost alternative (considering price, special qualifications, administrative costs, etc.) to meet the Government's needs.

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## ***Strategic Acquisition Transactions Guide***

### ***Documentation***

- Buying members, at a minimum, should document orders by identifying the Schedule contractor from which the services were purchased, identify the services purchased, and the amount paid.

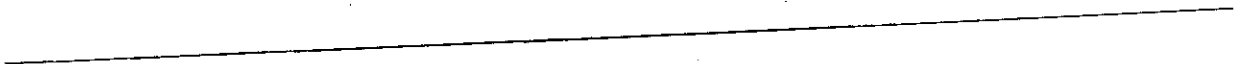
If other than a firm-fixed priced order is placed, such documentation should include the basis for the determination to use a labor-hour or time-and-materials order.

For agency requirements in excess of the micro-purchase threshold, the order file should document the evaluation of Schedule contractors' quotes that formed the basis for the selection of the contractor that received the order and the rationale for any trade-offs made in making the selection.

- When the buying member's office's requirement involves both products as well as executive, administrative and/or professional services, the buying member's office should total the prices for the products and the firm-fixed prices for the services and select the Schedule contractor that represents the greatest value in terms of meeting the agency's total needs.
-

**Attachment B**

**Ordering Procedures for Services and Products  
(No Statement of Work Required)**



**Procedures for Services and Products  
(No Statement of Work Required)**

The following ordering procedures **must** be followed, as required by FAR 8.404 [www.warnernet.gov/far](http://www.warnernet.gov/far) when ordering products and/or services that do **not** require a Statement of Work when using the MAS Program.

**Orders under the \$2,500 micro-purchase threshold**

You can place the order directly with contractor for the item that best meets your needs.

**Orders over the \$2,500 micro-purchase threshold**

As required by FAR 8.404, you are required to:

- Review the GSA *Advantage!* or online shopping service
- Schedule Contractors' price lists
- Select the Best Value (considering price, plus administrative cost)

**Orders over the maximum order threshold**

Each Schedule contract has an established maximum order threshold.

- Follow the procedures for orders over \$2,500
- Review additional price lists or use "GSA *Advantage!* online shopping service
- Seek price reductions from Schedule contractors that represent Best Value
- Place your order with the Schedule contractor offering the Best Value.

You should follow the ordering procedures explained above. If further price reductions are not offered, an order may still be placed if you determine that it is appropriate.

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## *Strategic Acquisition Transactions Guide*

### **Documentation**

- Minimum documentation is generally all that is required (e.g. contractor's name, items purchased and prices paid).
  - Additional documentation is necessary when your requirement is defined to a particular brand name and only for orders exceeding the micro-purchase threshold.
  - When you follow the procedures of FAR 8.4 [www.arnet.gov/far](http://www.arnet.gov/far), buying members **should limit your review** to the information provided by **Schedule contractor**
-

***Strategic Acquisition Transactions Guide***

**Attachment C**

**Sample Selection Statement for FSS Services Acquisition**

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**SELECTION/AWARD MEMORANDUM**  
**[Insert Program] Support Services**

The Department of Energy issued an invitation to four GSA MOBIS Schedule vendors to attend a pre-proposal conference to discuss providing support services for [program mission] for the Office of Administrative Support (MA-XX). A Request for Quotation (RFQ) was issued via the DOE Industry Interactive Procurement System (IIPS) on [insert date]. Due to projected budget restraints for FY 03, the anticipated period of performance of sixty (60) months will consist of one 8-month base period, one 4-month option period and four 12-month option periods. An award will be made in accordance with FAR 8.4, GSA Schedules. The preproposal conference was conducted on [insert date].

The competition was reserved for small business firms from the GSA FSS MOBIS vendor list. However, the DOE permitted a teaming arrangement by small businesses with large business firms who are also on the GSA FSS MOBIS schedule. The solicitation informed all offerors that the following labor categories were considered critical services and must be provided as employees of the small business offeror as the prime. In total, the small business prime must provide at least 75% of the labor hours:

- Project Manager
- Site Supervisor - Germantown
- Site Supervisor - Washington
- (labor category) - Germantown (2)
- (labor category) - Washington (3)

Based on MA-XX's review of the GSA MOBIS Schedule vendors, a recommendation was made by MA-XX to invite the following firms to the preproposal conference:

Company 1  
Company 2  
Company 3  
Company 4

It is noted that Company 4 did not attend the preproposal conference.

The solicitation requested that the offeror prepare proposals based on technical approach, key personnel, past performance, and price. The solicitation stated that past performance will be evaluated on a pass (satisfactory) /fail (unsatisfactory) basis to determine that the firm (and their GSA MOBIS Schedule team member) has (have) been successful in providing support services under their largest three awards, within the last three years, from U.S. Government clients or other clients from commercial sources. Experience in [insert key programmatic responsibilities] would be a priority for past performance. The DOE anticipated that the award would be a Time-and-Materials instrument. Proposals were due via the DOE IIPS on [insert date].

DOE received proposals from:

Company 1 (teamed with MOBIS vendor Z)  
Company 2  
Company 3

The Technical Evaluation Panel (TEP) reviewed Companies 1, 2, and 3 relative to determining the best value recommendation under the solicitation. The TEP completed the evaluation of the following three firms (1) Company 1; (2) Company 2; and, (3) Company 3 in accordance with the technical evaluation criteria under solicitation DE-RQ01-03ADXXXXX. The attached evaluation report demonstrated that the technical proposal from Company 1 is superior under the Technical Approach and Key Personnel criteria. All three firms are equivalent under the Past Performance criterion. All references gave a passing evaluation for each of the three firms.

All three firms complied with the solicitation that at least 75% of the labor hours were to be provided by the prime small business.

A revision to the offeror's technical proposal was not solicited.

Company 2 offered the highest price of the three firms under the solicitation. The evaluation of the proposal identified significant weaknesses within the proposal as follows:

- Company 2 did not demonstrate how they would actually perform the services in any of the functional areas in the statement of work.
- Company 2 lacks extensive experience in providing [insert type of services being acquired] services.
- Company 2 proposed several key personnel who did not meet the position requirements.

Based on Company 2's higher price, identified weaknesses, and the lack of any significant strengths, Company 2's proposal is not considered the best value.

The price proposal offered by Company 3 is less expensive than Company 1's price proposal. However, the technical proposal provided by Company 3 contained the following significant weaknesses that would not make the Company 3's offer a best value:

- Company 3 supplements their management experience by discussing a team arrangement with a known (specialty) contractor, Company X. However, the proposal does not develop the arrangement nor does Company X provide personnel based on their schedule.
- The proposed personnel are Company 3 employees; however, the offeror failed to demonstrate that most of the personnel proposed meet the requisite experience contained in the position descriptions of the solicitation.
- Company 3 failed to demonstrate how they would actually perform each of the functional areas of the statement of work.

Company 1 provided a superior Technical Approach and Key Personnel to provide services for DOE in Washington, DC and Germantown, MD. Company 1's price exceeds Company 3's price by 8.4% but is lower than the price offered by Company 2. The TEP recommended in their evaluation that the price differential is justified by the superior Technical Approach and Key Personnel demonstrated in their proposal. The price differential is justified by the superior Technical Approach and Key Personnel proposed by Company 1, as addressed below. In addition, Company 1 has teamed with the incumbent contractor, Company Z):

- Clear and concise methodology to perform each of the functional task areas of the statement of work. Company 1 proposed several innovations in the operations of the XX. For example, Company 1 has extensive experience in marketing their training services throughout the DOE. This marketing experience will be used to expand the use of the XX and attract more revenue for services. Company 1 will be using Company Z sources that have historically provided DOE over \$150,000 in discounts to date.
- Company 1 proposes to design a [XX] liaison program to help to insure DOE Program Offices do not duplicate the purchase of services already being provided through the client office.
- Company 1 will use consortium site licenses, which have in the past saved the DOE \$1.2 million in FY 2001. These savings will continue by Company 1 negotiating future consortium site licenses.
- Company 1 has gained hands-on experience in DOE's policies, procedures, systems, databases, customer bases and on-going initiatives by acquiring the staffing the effort entirely with

employees who are currently providing these services. There will be no start-up expense of training new personnel.

- Company 1 has acquired all incumbent employees with security clearances. The DOE will not have to spend several thousand dollars in processing new security clearances.
- Technical innovations are critical to the MA-XX mission. Automation of materials constitutes the largest expenditures. Company 1 has an established subcontractor, Company Z, who is the incumbent contractor. Company Z's knowledge of MA-XX services is state-of-the-art and will continue providing innovative approaches to MA-XX services and most importantly, cost cutting recommendations that exploit the electronic MA-XX systems and services.
- Company 1 has proposed several enhancements to MA-XX's systems. These improvements have the result of increasing MA-XX's client base, and streamlining electronic systems. These are considered innovative cost savings recommendations.
- Company 1 has recommended another cost savings initiative that involves a free services called "XX" for non-technical documents. DOE currently uses a fee for the service under the contract.
- Company 1 has acquired all Key Personnel from the incumbent contractor Company Z. The existing Key Personnel are fully trained in DOE MA-XX operations. Their enthusiasm for the work has been demonstrated continuously by DOE customers providing hundreds of accolades for expert MA-XX services. Keeping customers satisfied translate in cost savings by repeat customers. The customer's program offices provide a large amount of MA-XX funding.
- Company 1's entire Key Personnel staff meets DOE Position Descriptions. There will be no lost time filling vacancies.
- Company 1 has proposed an acceptable methodology to insure that staff members receive continuous education to maintain their state-of-the-art expertise. The continuous education (seminars, course instruction) will be provided at no cost to DOE.
- The Company 1 acquisition personnel represent the best of the lessons learned in acquiring [XX] services. These individuals have a proven track record in saving DOE thousands of dollars.

The proposal strengths noted above are unique to Company 1's proposal.

Based on the numerous potential cost saving elements offered by the Company 1 proposal, Company 1 provided a proposal offering a detailed understanding of DOE's MA-XX operations and innovative recommendations to improve services and increase the customer base. At the same time, much of the proposed work provides for new cost savings and carries on the best time proven savings initiatives. Company 1's Core Personnel and Key Personnel will provide a seamless transition to the new contract, while maintaining a relationship to the incumbent contractor who created most of the MA-XX software system and operational procedures.

The Contract Specialist evaluated the labor rates for Company 1/Company Z and confirmed that the proposed rates are in accordance with their respective GSA MOBIS Schedule published rates. The labor rates and discounts are considered fair and reasonable when compared to their GSA Schedule contracts (See price evaluation, Attachment 2 to this memorandum).

Price proposals were due via the DOE IIPS on (date), and were received on time from all three offerors:

Company 3	\$10,800,000.00
Company 1	\$11,700,000.00
Company 2	\$13,000,000.00

As noted above, Company 1 provided a superior Technical Approach and Key Personnel to provide MA-XX services for DOE in Washington, DC and Germantown, MD. Company 1's price of [insert date], exceeded Company 3's price by 8.4% but is less than the price offered by Company 2. The TEP already recommended in their evaluation that the price differential between Company 3 and Company 1, and Company's 1 price proposal of [insert date] was reasonable as a best value of the three offerors.

The Contract Specialist performed a final evaluation of the labor rates for Company 1/Company Z and confirmed that the proposed rates are in accordance with their respective GSA MOBIS Schedule published rates. Company 1 provided a 41.5% discount rate for all labor categories. It is hereby determined that the labor rates and discounts contained in Company 1's final proposal are fair and reasonable and represents the best value to the government.

Based on the above, it is hereby recommended that Company I/Company Z be selected as the best value vendor for the proposed statement of work under DE-RQ01-03XXXXX.

\_\_\_\_\_  
Contract Specialist                      Date

CONCUR:

\_\_\_\_\_  
Contracting Officer                      Date

\_\_\_\_\_  
Independent Review                      Date

\_\_\_\_\_  
Division Director                      Date

APPROVED:

\_\_\_\_\_  
Head of the Contracting Activity                      Date

Attachment:

1. Technical Evaluation Panel Recommendation.
2. Price Evaluation

**Attachment D**

**Sample Ordering Clause for Multiple Award Contracts**

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*Strategic Acquisition Transactions Guide*

H.12 PROCEDURES FOR ISSUING TASK ORDERS -- PCO AND ACO ORDERING

Only DOE Procuring Contracting Officers (PCO)s and Administrative Contracting Officers (ACO)s are authorized to place Task Orders under this contract. The term contracting officer, as used in this clause, means PCO or ACO.

If the Government has awarded more than one contract for the work specified in the Statement of Work of this contract, the Contracting Officer will periodically issue Task Orders to one or more of these contractors, pursuant to the procedures set forth in paragraph (a) or (b) below:

(a) The Contracting Officer may issue a task to any one of the contractors if he/she determines, in his or her sole discretion that:

1. Following any of the procedures of paragraph (b) would result in unacceptable delays in fulfilling the requirement which is the subject of the Task Order;
2. The task requires services that are unique or highly specialized and that only one contractor can provide the services to the level of quality required;
3. The task is a logical follow-on to a Task Order previously issued to a contractor pursuant to paragraph (b) (1) below; or
4. It is necessary to issue the Task Order to a contractor to fulfill a minimum guarantee.

(b) The Contractor agrees that issuance of a Task Order in accordance with the procedures listed in this paragraph is deemed to have provided the Contractor a "fair opportunity to be considered" as that phrase is used in Section 303J(b) of the Federal Property and Administrative Services Act of 1949, as amended, for this issuance of Task Orders under the contract.

1. Issuance of Task Orders Based Substantially on Performance of Previous Task Orders With Cost a Considered Factor

In issuing tasks based substantially on performance of previous tasks, the Contracting Officer will evaluate records of the contractors' technical performance and cost control on previous tasks issued for the work specified in the Statement of Work of this contract, taking into account performance under tasks most comparable to the prospective task. In order to issue initial tasks under this contract on this basis, the Contracting Officer may consider the quality of the contractors' technical proposals under the solicitation leading to the award of this contract, taking into account the portion of the proposal most comparable to the prospective task.

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After such an evaluation, the Contracting Officer will make award to the contractor he or she believes most likely to perform the task at the highest quality at the best value. If issuance of a task will be based substantially on performance of previous tasks, cost proposals will be requested.

2. Issuance of Task Orders Based on Cost/Price

(i) When the issuance of a Task Order is to be based entirely on cost or price, the Contracting Officer will provide each contractor information as delineated in the clause entitled, "Task Orders," of this contract relating to the prospective task, specifying that the award will be based entirely on cost/price. The Contractor will provide a task proposal as specified in the "Task Orders" clause. The Contracting Officer will exercise his/her best judgment in determining whether elements of cost reasonably reflect the nature of the prospective task. To the extent required, the Contracting Officer will negotiate the proposals.

(ii) The Contracting Officer may choose to base award substantially on cost or price, in which case the Contracting Officer will issue a request for task proposals which specifies any additional selection factors, and their relative importance, to be used in the selection of the recipient of the task.

3. Issuance of Task Orders Based Substantially on Technical Merit

In issuing tasks based substantially on technical merit, the Contracting Officer, along with the DOE Technical Manager(s) named elsewhere in this contract, will request technical and cost/price proposals on the Statement of Work required for the Task Order. The request for task proposal will specify the selection factors and the means of submission of the proposal. After evaluation, the Contracting Officer will make award to the contractor he or she believes most likely to perform the task at the highest quality and reasonable cost/price.

4. Issuance of Task Orders Based upon Other Criteria

In issuing tasks under this procedure, the Contracting Officer may base the issuance on any other factor(s) which he or she deems appropriate in the exercise of sound business judgment. Such factors include, but are not limited to, selection based upon best value (cost/technical tradeoffs) for performance of a prospective task. If the selection factor or factors require the submission of task proposals from the contractors, the factor or factors to be used in selecting the recipient of the task, and their relative importance, will be specified in the request for a task proposal by the Contracting Officer.

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5. Issuance of Task Orders Utilizing Limited Competition

(i) The Contracting Officer may offer a fair opportunity for a task award solely among small business or small disadvantaged business within a particular functional or sub-functional area.

(ii) Task Orders issued under pursuant to paragraph 5.(i) will be awarded based on one of the award scenarios described in paragraphs 1 through 4 of this paragraph b.

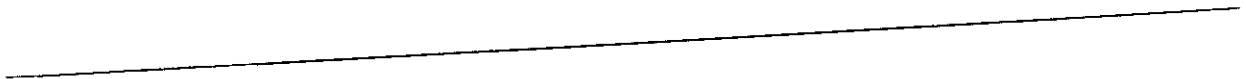
(c) An Ombudsman has been designated for the contracting activity awarding this contract to ensure that all contractors are afforded a fair opportunity to be considered for task or delivery orders pursuant to FAR 16.5. The purpose of the Ombudsman is not to diminish the authority of the Contracting Officer, but to receive on behalf of and to communicate to the appropriate Government personnel concerns and disagreements of contractor(s) not receiving a specific task and to work to resolve the matter. When requested, the Ombudsman will maintain strict confidentiality as to the source of the concern. The Ombudsman does not participate in the original selection of contractors or in the evaluation or determination of the issuance of task or delivery orders under this contract, does not act in the capacity of a Contracting Officer, and does not participate in the adjudication of contract disputes, in regard to multiple award task or delivery order contracts awarded pursuant to FAR 16.5. Interested parties may contact the Contracting Activity Ombudsman, at (202) XXX-XXXX or by email: [ ] with concerns or disagreements. Those issues which cannot be resolved at the level of the Contracting Activity Ombudsman may be referred to the DOE Task and Delivery Order Ombudsman.

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**Attachment E**

**Governmentwide Acquisition Contracts  
and Multi-Agency Contracts**



**(GOVERNMENT-WIDE ACQUISITION CONTRACTS GWACS) and MULTI-AGENCY CONTRACTS**  
05/31/02

Host Agency	Type	Fee	Compete?	Lead Time	Comments
FLETC Non-toxic Ammunition (ends 2003)	IDIQ	No	Yes	3 weeks	Contracts awarded to Blount Inc., Delta Frangible Ammunition, Federal Cartridge Co., Longbow, Inc., Remington Arms Co., Simunition, and Olin Corp./Winchester Division. Various sizes of frangible and non-frangible cartridges are available. Orders must be placed by the Federal Law Enforcement Training Center. Contact Patricia Newman at 912/267-3171 to obtain information on establishing an MOU for Orders
Veterans' Affairs (Ends 9/2002)	BPA	1% incl.	Limited . Review other prices	Very fast-3 days	Very flexible and easy to use. BPAs are based on GSA Schedule contracts with A&T Systems, NCI Information Systems and Pulsar Data Systems. No per order ceiling. Suppliers: Dell, IBM, HP, Compaq, etc., Trng & svcs. also avail. Call Fred Sanders, A&T (301/384-1425, ext320); call Denise McKenzie, Pulsar (301/853-5112) or Laura Thomas, NCI (703/287-8221). No fee if agency issues its own orders
NIH CIO-SP 11 (10 years)	IDIQ	1% max.	Yes	2-3 weeks	Must follow NIH procedures, which are explained on web site below. Must fax/e-mail SOW and "TORP" (task order request for proposal) to NIH; NIH must approve SOW and source selection docs. There are 48 primes, MANY subs. Nine task areas: CIO Support, Outsourcing, IT operations & maintenance, Integration Svcs, Critical Infrastructure & Information Assurance, Digital Gov't, Enterprise Resource Planning, Clinical Support/Research Svcs, and Software Development. Fees: 1% if prime is lg. bus; if sm. bus, fee is 1% up to \$5M; .75% up to 10M; .5% over \$10M. See ( <a href="http://nitaac.nih.gov/Nhome/cio2">http://nitaac.nih.gov/Nhome/cio2</a> ) or phone 1-888-773-6542
CECOM's Boundary Security Device BPA's (Ends 1/2004)	IDIQ	0%	Yes	2-3 weeks	BPAs awarded to Electronic Systems of Richmond ( <a href="http://www.esr.com">http://www.esr.com</a> ) GTSI ( <a href="http://www.gtsi.com/ArmySecurity">http://www.gtsi.com/ArmySecurity</a> ) Paragon Systems ( <a href="http://www.paragon-systems.com">http://www.paragon-systems.com</a> ) and Patriot Technologies ( <a href="http://www.patriot-tech.com">http://www.patriot-tech.com</a> ). Contact Julia Conyers-Lucero at 520/838-8259.
CECOM's Rapid Response (R2) (Ends 7-2003)	IDIQ	1%	Yes	19 days	Contracts awarded to ARINC and Lear Siegler Services for services, training and support see ( <a href="http://r2csr.mornmouth.army">http://r2csr.mornmouth.army</a> ) or contact Laura Hanke, 405/605-7137.

DISA's Encore Information Technology Solutions (Ends 3/2009)	IDIQ	2%	Yes	2-4 weeks	Contracts awarded to Analytical Services Inc., CSC, EDS, Lockheed-Martin Integrated Systems, Northrup Grumman Information Technology, Pragmatics, Inc., TranTech Inc., TRW and Unisys Federal. Under these contracts, the contractors provide services, hardware, software and associated enabling products to satisfy IT activities at all operating levels. Areas supported by these contracts include Command and Control, Intelligence and Mission Support areas, as well as all elements of the Global Information Grid (GIG). DISA will conduct competition, though customer agency can have input on source selection. Contact Major Doug Armstrong, 618/229-9302. See <a href="http://www.disa.mil/D4/ditoss/encorchar.html">http://www.disa.mil/D4/ditoss/encorchar.html</a>
DISA's Enhanced Mobile Satellite Service (Ends 12/2002)	IDIQ	2%	No	1-3 weeks	Contract awarded to General Dynamics Decision Systems for Iridium satellite network equipment and services. Contact Augustine Ponturiero, 703-607-6292. See <a href="http://www.ditco.disa.mil">http://www.ditco.disa.mil</a>
FBI Pistols (Ends 5/02 and 5/03)	IDIQ	No	No	1-2 weeks	Contract awarded to Glock for .40 caliber DA pistol (ends 5/02) and to Springfield, Inc. for .45 SA pistol (ends 5/03). Contact Theresa Powell at 703-632-1640.
Justice Legal Support Services (Ends 12/03)	IDIQ	No	No	1-2 weeks	Contract awarded to Dyncorp for asset forfeiture and paralegal services. Contact Dave Johnson at 202-307-1967.
Justice Gen. Support Svcs. (Ends 9/03)	IDIQ	No	Yes	2-3 weeks	Contracts awarded to DDD company and Vistrionix for general support services. Contact Joyce McCoy at 202-307-1972.
Justice ASSIST-2 (Ends 9/06)	IDIQ	Yes	Yes	2-3 weeks	Contracts awarded to Compaq Federal, DynCorp, and Unisys Corp. to obtain hardware maint., help desk, config./asset management, and operations support. See <a href="http://www.usdoj.gov/imd/irm/sts/assist/doj2.htm">http://www.usdoj.gov/imd/irm/sts/assist/doj2.htm</a> for ordering procedures and fee. Must establish agreement with DoJ; they will award on your OF-347 once funds are certified as being available. Contact Mark Selweski at 202-307-1968.
Justice IT Support Svcs. (Ends 5/04)	IDIQ	3.5% 2% .5%	Yes	2-3 weeks	Contracts awarded to CSC, DynCorp, Keane Federal, Lockheed Martin, Logicon, and Pragmatics for IT support services. Range in fee depends on task order amount (up to \$ 1M, 3.5 %; over \$ 1M to \$ 10M, 2 %; over \$ 10M, .5 %). Must establish reimbursable agreement w/ DoJ. See <a href="http://www.usdoj.gov/imd/irm/sts/its2001/its.htm">http://www.usdoj.gov/imd/irm/sts/its2001/its.htm</a> Contact Nancy Feeney at 202-307-1976.

NASA SEWP III (Awarded 7/01)	IDIQ	0% under \$2500. 75% over \$2500	Limited. Review other prices; compete if mult. awards	2-5 days	Easy to use. Program ofc must get faxed quote to submit w/ req. We fax orders to NASA and NASA forwards to vendor. Primes are H-P (Classes 1 and 8); GTSI/Sun Microsystems (Class 2); IBM (Class 4); Silicon Graphics (Class 5); Silicon Graphics, GMR and Cray (Class 6-mult. award); GTSI, Unisys, Logicon/FDC (Class 11-mult. award); GTSI, Logicon/FDC, & GMR (Class 13-mult. award). For explanations of Class designations, click on "What's in SEWP?" See <a href="http://www.sewp.nasa.gov">http://www.sewp.nasa.gov</a> Call SEWP Bowl Help Line, 301/286-1478. Ordering guide is available on-line, with detailed instructions.
NASA ODIN (Ends 2007)	IDIQ	1%	Limited.	2-4 weeks	Contracts with Boeing, CSC, DynCorp, FDC, Intellisource Info. Systems, OAO, and Wang. "Seat management" concept. Orders must go through FEDCAC w/ 1 % fee. Contact Chris Wren, 703/605-9811. NASA's web site is <a href="http://www.odin.nasa.gov/homepage.html">http://www.odin.nasa.gov/homepage.html</a>
NIH ImageWorld II	IDIQ	1% max.	Limited. Review other prices	2-3 days	Easy to use. Contracts are for medical imaging hardware/software, electronic document mgmt, and GIS. 24 primes and 200 subs include Unisys, Universal Hi-Tech Development, EDS, Lockheed Martin, Sytel, Seta. See <a href="http://nitaac.nih.gov/Nhome/IW2">http://nitaac.nih.gov/Nhome/IW2</a> or call hotline at 1-888-773-6542. Fee structure same as NIH CIO-SP II.
DoJ ITSS (Ends 2004)	IDIQ	5-3.5%	Yes	1-2 weeks	Requires establishment of a reimbursable agreement with DoJ (though a possible option is to have DoJ use your fiscal strip on the task order). Primes are CSC, DynCorp, Keane Federal Systems, Lockheed-Martin, Logicon, and Pragmatics. Contact Nancy Feeney at DoJ on 202/307-1976. See <a href="http://www.usdoj.gov/jmd/irm/sts/itss2001/itss.htm">http://www.usdoj.gov/jmd/irm/sts/itss2001/itss.htm</a>
DoT ITOP II (Ends 1/2006)	IDIQ	.75-2.75% (depends on level of support)	Yes	2-3 weeks	Three functional areas: Information systems engineering, systems ops. & mgmt, and info. sys. security support svcs. Primes include EDS, Booz Allen, Wang Gov't Svcs., SRA, Litton/TASC, DynCorp, Logicon, Lockheed Martin, SAIC, Unisys (26 awards), etc., including 8 8(a) firms. Contact ITOP program office, 202/366-6338. See <a href="http://itol.dot.gov">http://itol.dot.gov</a> (web site is very complete in terms of step-by-step ordering procedures, fees, etc.)
DoT VANITS (Ends 8/2007)	IDIQ	.75-2.75%	Yes	2-3 weeks	Value-Added Niche Information Technology Services contracts awarded to over 100 contractors in the following 11 functional areas: Business intelligence services (data warehousing/mining); e-commerce services; e-mail/messaging services; enterprise resources processes services; remote maintenance monitoring services; e-Learning services; systems transition/migration/remediation services; assistive technology services; Government financial systems services; secure communications services; and operational maintenance support. Contact Ames Owens, 202/366-9614. See <a href="http://vanits.dot.gov">http://vanits.dot.gov</a>

DoT STATUS (Ends 5/2006)	IDIQ	.75- 2.75%	Yes	2-3 weeks	Specialized and Technology User Services (STATUS) program awarded to over 100 companies, in 5 technical areas: geographic information systems, artificial intelligence, wireless/technologies/networks, e-learning and learning management systems, and operational maintenance support. Contract is open to Federal, state and local governments. Contact the program office at 202/385-6789. See <a href="http://status.dot.gov">http://status.dot.gov</a>
Defense Message System (Ends 4/2003)	IDIQ	N	N	2-3 weeks	Contract awarded to Lockheed-Martin for secure messaging infrastructure hardware and software (Unix and NT workstations, MS Exchange and Lotus E-mail, etc.). Provides complete systems integration, training, and technical support. Contact Jerry Bennis, 703/681-0921. See <a href="http://www.disa.mil">http://www.disa.mil</a> (click on contract vehicles; select DMS).
DISA's DEIS II (Ends 6/30/2002)	IDIQ	2	Yes	1-3 weeks	(DEIS= Defense Enterprise Integration Svcs) Contracts awarded to CSC, EDS, Lockheed-Martin, SAIC, TRW, and Unisys for BPR, systems development and implementation/deployment, etc. Contact Mark Schneider, 618-229-9137. See <a href="http://www.disa.mil/D4/diioss/deischer.html">http://www.disa.mil/D4/diioss/deischer.html</a>
DISA's Infor- mation Assure (I ASSURE) I (Ends 7/2007)	IDIQ	2	Yes	3-4 weeks	Eleven performance-based contracts awarded to ACS Defense (8 subs), ATREL Inc. (10 subs), CSC, EDS (15 subs), Logicon (23 subs), Pragmatics Inc. (8 subs), SAIC (15 subs), and SRA Corp. (14 subs), TASC (10 subs), Veridian (37 subs incl. 4 universities), and Getronics Gov't Solutions (21 subs). Contractors will provide a full range of IT/IA services to protect and defend information and information systems by ensuring their availability, integrity, authentication, confidentiality and non-repudiation. Includes h/w, s/w, dissemination devices, etc. Contact Bill Keely (703/882-1504). See <a href="http://www.disa.mil/D4/diioss/iachar.html">http://www.disa.mil/D4/diioss/iachar.html</a>
FAA BITS (Ends 2003)	IDIQ	1%	Yes	1-3 weeks	All awardees are small or 8(a) firms. Can set work aside for one group or the other. 15 primes. FAA extremely helpful for smooth processing. Call Jack Handrahan, 202/267-9781, or Regina Fletcher, 202/267-7806. See <a href="http://www.faa.gov/ait/bits">http://www.faa.gov/ait/bits</a>
GSA FAST, Heartland Region (Ends 10/2004)	IDIQ	1% incl. in pric	Yes	1-3 wks. (11 regional ofcs)	Federal Acquisition Svcs for Technology (FAST). Service provided by your closest GSA regional office. They will use the multiple award schedules, GWACs, and a number of 8(a) contracts they awarded-whatever gets you what you need fastest. Contact Delta Helm, 877/FAST SDC. Fee is negotiable. See <a href="http://www.fast.sdc.gsa.gov">http://www.fast.sdc.gsa.gov</a>
GSA's ENIGMA	IDIQ	2-4%	Yes	1-3 weeks	ENIGMA is a multiple award program that arose from PDP-63 and the Government Information Security Reform Act. "Trusted neutral" partner (contractors) will assess the critical infrastructure security (classified or unclassified); NSA's INFOSEC assessment methodology is used. Prepares agency for audit; helps establish baseline program information. Contact Jack Bowers, 202/708-7685. See <a href="http://www.fis.gsa.gov/enigma.enigmamain.htm">http://www.fis.gsa.gov/enigma.enigmamain.htm</a>



DIA's SS-II Program (Contracts may have ended 4/02)	IDIQ	0%	Yes	2 weeks	Contracts are in place with Compaq Federal, Northrup Grumman, Sun Microsystems, Sytel, Inc., and Tracor-ES for Tempest hardware/systems. Contact Jim Dashiell at 202/231-2670. See <a href="http://assess.dia.mil">http://assess.dia.mil</a> (click on SASS II).
Navy's NAVICPmart	IDIQ	0%	No	1 day-1 week	Navy has awarded requirements contracts for a number of electrical tools and test equipment, including network analyzers. All government agencies can use these vehicles. Orders can be placed on the Internet, by using a purchase card, or a hard-copy order. Items included have been tested and approved by the Navy. Delivery time is long - 45 to 120 days, depending on the items. Call 1-888-665-3454 for more information, or visit <a href="http://www.navicpmart.com">http://www.navicpmart.com</a>
NM ECS H (Ends 9/2002)	IDIQ	1% incl.	Yes	5 days	MANY vendors (45!) & products all viewable on the web. See <a href="http://nitaac.nih.gov">http://nitaac.nih.gov</a> Intelligent Decisions carries Tempest and zoned equipment (contact Michael Phu, 703/689-9908). Contact Millicent Carr-Manning in the NIH program office, at 301/402-3072.
GSA WACS (Ends 2002)	IDIQ	2.5%	No	2-3 weeks	Wire and cable services domestic and overseas. Call Sabrina Craine, 703/904-2810. See <a href="http://www.fts.gsa.gov/html/fts_mall/Wiring_Cabling.html">http://www.fts.gsa.gov/html/fts_mall/Wiring_Cabling.html</a>
GSA's ANSWER (Ends 2008)	IDIQ	1% incl.	Yes	2-4 weeks	Contracts w/ Anteon, Booz-Allen, CSC, DynCorp, EER, Info. Systems Support, ITS Corp., Litton/PRC, Logicon, and SAIC. Provides wide range of software support and other IT services. Contact Thelma Riusaki, 510/637-3880. See <a href="http://answer.gsa.gov">http://answer.gsa.gov</a> Complete ordering guide on web site. Agencies can direct order/direct bill once GSA's C.O. gives authorization.
GSA's Safeguard	IDIQ	1% incl.	Yes	2-4 weeks	GSA has awarded 27 BPA's to help agencies comply with PDD 63 and critical infrastructure protection requirements. Six functional areas include critical infrastructure asset identification, risk management, critical infrastructure continuity and contingency planning, physical infrastructure protection, information systems security and information assurance, and emergency preparedness, awareness training, exercises and simulation. Contact Donald Carlson (program mgr) on 202/708-7531, or <a href="mailto:donald.carlson@gsa.gov">donald.carlson@gsa.gov</a> See <a href="http://www.fts.gsa.gov/safeguard">http://www.fts.gsa.gov/safeguard</a> GSA will issue the order for you or issue a DPA for direct orders. Customer guide and base SOW are on web site.
GSA's Business Architecture Modernization (BAM) (Ends 6/2002)	IDIQ	Varies	Yes	2-6 weeks	Contracts with CSC, Litton PRC, SETA Corp., Booz, Allen & Hamilton, SRA International, Wizdom, and Abacus Technology. Services include strategic planning assistance, infrastructure management/planning/oversight, BPR, training, etc. Contact Rian Block, FEDSIM, 703/216-8284. See <a href="http://fedsim.gsa.gov/bam">http://fedsim.gsa.gov/bam</a>

GSA's CINEMA (Ends 2002)	IDIQ	1% incl.	No	2-4 weeks	Contracts with BTG and AT&T Global Networks for Internet access, e-mail, and EC activities. Contact Mary Kenney, 703/306-6307. See <a href="http://www.fts.gsa.gov">http://www.fts.gsa.gov</a> [in the left-hand column, click on the program pull-down list and then on "Internet Services (CINEMA)"]. Contract is direct order-direct bill; competition not required, but may want to obtain quote depending on anticipated services type(s). If requirements are international, select AT&T.
GSA Millennia (Ends 2009)	IDIQ	1%	Yes	2-4 weeks	Contracts with Boeing, Booz-Allen, CSC, DynCorp, Lockheed Martin, Litton/PRC, Logicon, OAO, Raytheon, SAIC, SRA, and Unisys. Three functional IT service areas: Software engineering, communications, and systems integration. Contact Sandye Simpson, 703/605-9808. See <a href="http://fedcac.gsa.gov/Millennia.htm">http://fedcac.gsa.gov/Millennia.htm</a> . Orders must be placed by an FTS office; competition required among all 12 vendors, but if there is an incumbent, firms are so notified.
GSA Millennia Lite (Ends 2010i)	IDIQ	1%	Yes	2-4 weeks	Contracts with Abacus Technology Corp, Anteon Corp, Calibre System Inc, C-EXEC, Data Networks Corp, EDSI, SI International Inc, Soza & Co. Ltd, Sytex Inc, User Technology Associates Inc., et al (over 30 firms). Four functional areas: IT planning/studies/assessment (contact Angela Joslin, 404-331-0156); high-end IT svcs (contact Patricia Renfro, 817-978-0039); mission support svcs (contact Angela Joslin, 404-331-0156); and legacy systems migration/new systems dev. (contact Greg Norman, 817-978-0027). Ceiling is \$20B. See <a href="http://lite.gsa.gov">http://lite.gsa.gov</a> . GSA can order or agency can order with delegation of authority from PCO. Contracts are award-term.
GSA ACES	IDIQ	1%	No	2 weeks	(Access Certificates for Electronic Services) GSA will assist Government agencies and citizens with authenticating digital signatures. Agencies must obtain a delegation of procurement authority from GSA, by submission of C.O. Warrant information. PKI and other types of e-commerce needs can be served under this program. Contact Reva Hutchinson, 202-501-1520. See <a href="http://www.gsa.gov/aces">http://www.gsa.gov/aces</a> for more information.
GSA Computing & Communications Recovery Services	IDIQ	.5%	Yes	2-4 weeks	Three contracts awarded by FEDCAC for disaster recovery services. Contractors are IBM Business Continuity and Recovery Services, Comdisco Continuity Services, and SunGard Recovery Services. Services include testing to help refine agency contingency plans, restore and recover operations, business impact analysis, and recovery planning. A no-cost, no-obligation proposal may be requested from the program manager, David Krohmal, by sending the request via e-mail to <a href="mailto:david.krohmal@gsa.gov">david.krohmal@gsa.gov</a> (or 703-619-6197). See <a href="http://fedcac.gsa.gov/disaster.htm">http://fedcac.gsa.gov/disaster.htm</a> (scroll down to "contracts" section)

GSA OBIS	IDIQ	1% incl.	Yes	2-4 weeks	These GSA Schedule contracts for consulting svcs., facilitation svcs., survey svcs., trng. svcs., and support products. MOBIS stands for Management, Organizational and Business Improvement Svcs. Schedule. Contracts w/ dozens of firms. Contact Warren Hayashi, 253/931-7050. See <a href="http://www.gsa.gov/Portal/content/offering_content.jsp?contentOID=115565&amp;content_Type=1004">http://www.gsa.gov/Portal/content/offering_content.jsp?contentOID=115565&amp;content_Type=1004</a>
GSA Seat Mngmt. (Ends 6/2008)	IDIQ	1% incl.	Yes	2-6 weeks	Contracts with DynCorp, EER Systems, FDC, IBM, Litton/PRC, Multimax, SAIC, and Wang. Operation/management of desktop computers/LANs. Contact Chris Wren, 703/605-9811. See <a href="http://seatmanagement.gsa.gov">http://seatmanagement.gsa.gov</a> This is a direct order-direct bill arrangement, but GSA must first issue a delegation letter to the agency C.O.
GSA TELIS (Ends 6/2002)	IDIQ	0%	No	1 week	Telecommunications systems and services, provided by EDS. Call Jeanne Davis, 781/860-7138. This is a direct order-direct bill arrangement, but GSA must first issue a delegation letter to the agency C.O. See <a href="http://fedcac.gsa.gov/Telis.htm">http://fedcac.gsa.gov/Telis.htm</a> (scroll down to "contracts" portion)
GSA's FEDSIM	IDIQ	2-6%	Varies	1-4 weeks	Various IT services can be contracted for by GSA on a fee-for-service basis. Drawback is high fee; advantage is that funds get transferred to GSA and become no-year money. Contact Linda Leicht, 703/756-4005, or Chip Ward, 703/756-4120.
Wireless Phones and Service	IDIQ	1%	No*	1-3 weeks	*Several vehicles are now in place to acquire wireless phones/air time. GSA in Boston has a BPA w/ Sprint (Motorola phones) (contact Mattie Buford, 617/565-5770); GSA in D.C. has a contract w/ Hughes Global Systems (Motorola and Kyocera phones) (contact Brian Johnson, 310/606-9508); DISA has a contract w/ Motorola for their phones (contact Deb Wellan, 618/229-9547)
GSA's Satellite Services (Ends 2006)	IDIQ	2% (incl.)	No	1 day-3 weeks	GSA's Fed. Technology Service awarded a contract to Hughes Global Services for commercial satellite communications services and products (space segment, teleport service, end-to-end satellite circuits, satellite networks, VSAT networks, video and data broadcast networks, etc.). GSA's fee is built into the prices (KTR pays GSA). Contact Peter Cunniffe at Hughes, 703/875-0545. See <a href="http://www.hughesglobal.com/gsa">http://www.hughesglobal.com/gsa</a>
GSA's WITS 2001 (Ends 2008)	IDIQ	varies	No	30 days	Contract awarded to Bell Atlantic, for services to be provided to the Washington, DC metropolitan area. See <a href="http://www.fts.gsa.gov">http://www.fts.gsa.gov</a> In the left-hand column, click on the programs pull-down menu and then on "WITS 2001." Services include Internet access, frame relay and asynchronous transfer mode data svcs, voice and video teleconferencing, purchase of customer premise equipment, etc. Ceiling is \$1B. Contact Bill Beardon, 202-501-1231.

GSA's Fed. Wireless Telecom Svcs (Ends 2005)	IDIQ	1%	No	1-2 weeks	Contract w/ DynCorp for wireless telecommunications services and equipment including pagers). Contact the Federal Wireless Center, 1-888/333-9473. See <a href="http://www.fedwireless.com">http://www.fedwireless.com</a> . Available nationwide & US Territories; includes provisioning, monitoring, reporting and billing. Verizon Wireless provides phone service. Fee is 4% monthly on SkyTel paging svcs. Direct order/direct billing (GTE bills for telephone svcs and SkyTel bills for pagers). Wide variety of phones and plans available.
Air Force's IT-2 BPA's - DoD Only (See Comments) (Ends 12/02)	IDIQ	1.54% + 1% GSA (latter is included in CLINs)	Limited (BPA's have been competed)	1-3 weeks	While contracts are primarily for DoD, permission can be obtained for use by other agencies by contacting <a href="mailto:ssg.ito@gunter.af.mil">ssg.ito@gunter.af.mil</a> or 334-416-5608. Contracts with GTSI, Gateway, Westwood Computer Corp (veteran-owned) and CDW-G, Dell and Micron for PC's and servers; workstations available from GTSI and Compaq-Federal; software available from Logicon, FDC, GTSI, qTech, Sytel, and Lockheed Martin. IT services available for DoD only from Centech, EDS, General Dynamics, Lockheed-Martin, Multimax, Northrup Grumman, RS Information Systems, Sumaria, and TRW. Items available include desktops, laptops, servers, networking equipment, accessories, printers, and services. Contact customer support at <a href="mailto:ssg.ito@gunter.af.mil">ssg.ito@gunter.af.mil</a> . See <a href="http://www.itsuperstore.af.mil">http://www.itsuperstore.af.mil</a> (NOTE: Website will be changing over 6/1/2002 to <a href="https://afway.af.mil">https://afway.af.mil</a> )
Air Force's ULANA H	IDIQ	1.74%	No	1-3 weeks	Contract with Sun Microsystems expires for purchase 3/2001. Contract with TRW is active until 8/2002. Both offer a myriad of networking hardware and software products, as well as services. (ULANA=Unified Local Area Network Architecture). Contact Michael Glennon, 334-416-4215. See <a href="http://web1.gunter.af.mil/CIT-PAD">http://web1.gunter.af.mil/CIT-PAD</a> or <a href="http://www.ulana2.com">http://www.ulana2.com</a> (latter is TRW's site)
Army's ADMC-I Program (Ends 5/2004)	IDIQ	incl	Yes	1-2 weeks	Army Desktop and Mobile Computing BPA's replace Portable-3 and PC-3 programs. BPA's awarded to CWD-G, GovConnection, Comark Inc., Dell, GTSI, iGov.com, Intelligent Decisions, Micron, and PlanetGov.com. Desktops and notebooks have on-site, 3-year warranty, worldwide. Desktops include Acer (Comark), Apple (CDW-G), Compaq (CDW-G), Dell, Gateway (PlanetGov), HP (GTSI), IBM (iGov), and Micron. Notebooks include Compaq, Dell, GETAC (Micron), Gateway (PlanetGov), HP (GTSI), IBM (iGov), Micron, Sony (Intell. Decisions), and Toshiba (Comark). Also includes Palm, NEC and HP organizers and Blackberry products. Vehicles are available to all agencies and agency contractors. See <a href="http://pmscp.monmouth.army.mil">http://pmscp.monmouth.army.mil</a> or call 1-888-232-4405.

Army's AIT II Program (Ends 7/2009)	IDIQ	No fee!	No	1-3 weeks	(Automatic Identification Technology) Contract awarded to Symbol Technology, Inc. for bar code equipment, microcircuitry, and ancillary services (installation, training, maintenance). Use purchase card or SF-1449. Orders for equipment and services must be separate, unless on a task order, equipment needed is under \$25K. All orders must go through the Central Order Processing Ofc (COPO). Contact Clarence Magwood, 703/806-3979. See <a href="http://www.peostamis.belvoir.army.mil/ait/homepageC.htm">http://www.peostamis.belvoir.army.mil/ait/homepageC.htm</a>
Army's Human Resources XXI (HR21) (Ends 2003)	IDIQ	2%	Yes	2-4 weeks	Contracts with Litton PRC and Resource Consultants, Inc. Provides a full range of HR resources, including administrative, technical and HR functions. All orders are issued by Army, so funds must be transferred to them to process order. Once issued, customer determines level of control over contractor's work, over and above QA of HRXXI staff. Contact Katie Cohen, 703/602-1303 or Naomi Lynch, 703/602-2982. See <a href="http://www.hrxxi.army.mil">http://www.hrxxi.army.mil</a>
Army's Small Computer Program (MMAD-G) Ends 5/2006	IDIQ	1% incl.	No	1-2 weeks	Contract with GTSI for high- and low-end Compaq servers and workstations. Includes lease options, mass storage items, software, routers, LAN items, printers, services, and total solution. 5-year warranty, worldwide. Payment by credit card is accepted. Contact Brian Rieth, 732-427-6589 (Army) or Carole Dunn, 703-502-2689 (GTSI). See <a href="http://pmsep.monmouth.army.mil/contracts/mmada_gtsi/mmada_gtsi.asp">http://pmsep.monmouth.army.mil/contracts/mmada_gtsi/mmada_gtsi.asp</a> or <a href="http://www.gtsi.com/mmada">http://www.gtsi.com/mmada</a>
GSA's	IDIQ	1%	Yes	1-2 weeks	Tempest and zoned equipment is available from Office Solutions ( <a href="http://www.officesolutionsinc.com">http://www.officesolutionsinc.com</a> ) and from Intelligent ( <a href="http://www.intelligent.net">http://www.intelligent.net</a> ). Both firms sell equipment manufactured by Hetra Secure Solutions. Contact Jim Jacobs, 703/642-1551, x12 or Phil Beaulieu, 703/803-8070, x325.
GSA MAS	IDIQ	0%	Yes	1-2 weeks	Computers and Security Solutions sells Tempest equipment on the open market (small, woman-owned business). No Gov't contracts except a BOA with NATO. Contact Karen Azoff, 703/922-0633. Very competitive pricing. Manufacturer is Emcon.
US Customs Wireless (Ends 2003)	IDIQ	0%	No	1-2 weeks	Motorola, Inc. provides land mobile radios and related services. Users must be delegated ordering authority by host agency before ordering. Contact Nellie Potocki-Reeves, 202/927-4901.
US Customs Vessel Maint. (Ends 2003)	IDIQ	0%	No	1-2 weeks	General Offshore Specialized Svcs. provides nationwide vessel maintenance services (CONUS, Puerto Rico, Virgin Islands). Authorized users have interagency agreements with Customs. Contact Randy Ash, 202/927-2554.
US Customs Helicopters (Ends 2003)	IDIQ	0%	No	1-3 weeks	American Eurocopter provides helicopters and components. Requirements contract for Customs. Users must be delegated ordering authority by host agency. Open to all state and federal agencies. Contact Pansy Bradley-Cooper, 202/927-0073.

US Customs Interceptors (Ends 2003)	IDIQ	0%	No	1-3 weeks	Fountain Power Boats provides interceptor vessels, open cockpit. Requirements contract for Customs. Users must be delegated ordering authority by host agency. Open to all state and federal agencies. Contact Pansy Bradley-Cooper, 202/927-0073.
US Customs Interceptors (Ends 2004)	IDIQ	0%	No	1-3 weeks	Midnight XP provides interceptor vessels, mono hull. Requirements contract for Customs. Users must be delegated ordering authority by host agency. Open to all state and federal agencies. Contact Pansy Bradley-Cooper, 202/927-0073.
US Customs Tracking Dev. (Ends 2003)	IDIW	0%	No	1-3 weeks	Star Trac provides vehicle communications tracking devices. Users must be delegated ordering authority by host agency. Open to all state and federal agencies. Contact Mark Weinstein, 202/927-0567.
US Customs (Ends 9/2003)	IDIQ	0%	No	1-3 weeks	Production Contracting, Inc. provides construction/renovation services in AZ and surrounding counties. Users must be delegated ordering authority by Customs. Contact Bill Mynatt, 317-298-1180, ext. 1270.
*Treasury's Financial Mgmt & Auditing (Ends 6/2004)	IDIQ	0%	No	1 week	Contracts awarded to Teldata Control, PriceWaterhouseCoopers, and The Profit Recovery Group Internat'l. See <a href="http://www.gcfeb.com/fbac">http://www.gcfeb.com/fbac</a> . Administering office is Franchise Business Activity, reporting to Treasury's CFO. Provides recovery audit svcs, on a firm-fixed recovery fee percentage basis; fee-for-svc work also available (hourly rates). Contact Dave Zingo, 513-684-6764.
*Treasury's Document Automation & Copier Svcs. (Ends 9/2002)	FFP & BPAs	0%	No	1 week	Contracts awarded to OCE USA, Minolta, Xerox, Ricoh, etc. See <a href="http://www.fedsources.gov">http://www.fedsources.gov</a> . Administering office is Franchise Business Activity, reporting to Treasury's CFO. Lease or buy or LTOP analog, digital, and/or color copiers; flexible arrangements, multiple types of copiers/capacities. Most plans incl. maintenance and consumables (not paper). Contact Linda Valentino, 312-886-9358.
*Treasury Franchise FBA-Global Svcs.' Staff Support svcs.	IDIQ	3%	No	1 week	Contract for staff support services with Star Digital, Software Professionals and Professional Performance Development Group. Call 210-308-4522. See <a href="http://www.fba.satx.disa.mil">http://www.fba.satx.disa.mil</a>
*Treasury Franchise FBA-Global Svcs.' IT Support Svcs.	BPA	3%	No	1 week	Contract for IT support services with Software Professionals and McBride & Assoc. Call 210-308-4522. See <a href="http://www.fba.satx.disa.mil">http://www.fba.satx.disa.mil</a>

*Treasury Franchise-FBA Global Svcs.' Project Mngmt. Support Svcs.	IDIQ	3%	No	1 week	Contracts awarded for project management support services, to Global Technical Systems, and Systems Integration Management. Call 210/308-4522. See, <a href="http://www.fba.satx.disa.mil">http://www.fba.satx.disa.mil</a>
*Treasury FedSource FBA-Central/GoTo.Gov Human Resources Svcs.	BPA	Incl.	No	1 week	Full range of HR services is available through a variety of vendors. Includes recruitment, pre-employment screening, classification, outplacement, ADR, Workers Comp, EEO counseling/reporting/case management. Nine awards, all small, SDB, or woman-owned (ordering agency gets credit). Nationwide coverage. Contact Karen Blum, 314-539-6016. See <a href="http://www.fedsources.gov">http://www.fedsources.gov</a>
*Treasury FedSource FBA-Central/GoTo.Gov - IT Equipint & Project Support Svcs.	BPA	Incl.	No	1 week - 1 month	Convenient access to a full line of Tier 1 IT equipment through 8(a) vendors. Includes wide variety of skill categories to staff IT projects. Nationwide coverage. Contact Karen Blum, 314/539-6015. See <a href="http://www.fedsources.gov">http://www.fedsources.gov</a>
*Treasury FedSource FBA-Central/GoTo.Gov Management Advisory Svcs.	BPA	Incl.	Yes	1 week to 1 month	Access to vendors to meet Congressional requirements for performance, financial management, outsourcing and overall management improvement. Nationwide coverage. Contact Rick Rider, 410/962-2283. See <a href="http://www.goto.gov">http://www.goto.gov</a>
*Treasury FBA-SC's Technical and Administrative Svcs.	BPA	3-5%	No	2 weeks	BPA's for technical and administrative services with ADI Technology Corp., Blackhawk Management Corp., Columbia Research Corp., Crystalview Technology Corp., End to End, Jardon & Howard Technologies, Professional Services Unlimited, ManTech, Progency Systems, Breil Worldwide Management, Engineering Solutions and Products. Fee goes down as volume goes up; 3 % minimum. Contact Marie Larson, 843/524-1541 or Jackie Coleman, 843/524-1136. (No web site available yet.)
*Treasury FBA-Global Svcs' Copier Mngmt Support Svcs.	BPA	3%	Yes	30 days	BPA's for copier management support services with Canon, Konica, Xerox, OCE and Ricoh. Call 210/308-4522. See <a href="http://www.fba.satx.disa.mil">http://www.fba.satx.disa.mil</a>
*Treasury FBA-SC's IT Services	BPA	3-5%	No	2 weeks	BPA's for IT services with Automation Precision Technology LLC and Computer Temporaries, Inc. Fee goes down as volume goes up; 3% minimum. Contact Marie Larson, 843/524-1541. (No web site available yet.)

Treasury, FBA-SC's Medical Svcs.	BPA	3-5%	No	2 weeks	BPA for medical services with StarMed Staffing Group. Contact Marie Larson, 643/524-1541. Fee goes down as volume of work goes up; 3% minimum. (No web site available)
Treasury's Employee Assistance Program (Ends 9/2002)	FFP	0%	No	1 day - 1 week	Contract with Green Spring Health Services. See <a href="http://www.fedsources.gov">http://www.fedsources.gov</a> . Administering office is Franchise Business Activity, reporting to Treasury's CFO. Typical EAP services are provided nationwide; billed on a per-capita basis, but hourly-rate and per-incident services are also available. Contact Diane Ridgway, 206-220-6129.
Treasury's Fed. Benefits Information System (Ends 9/2004)	IDIQ	Var.	No	30 days	Contracts awarded to Gov't Retirements & Benefits for software support; Bureau of Public Debt for hardware and Internet support. See <a href="http://www.gcfeb.com/fbac">http://www.gcfeb.com/fbac</a> . Internet-based application on Fed. Gov't Retirement, specific to individual employees (retirement estimates, disability benefits, survivor benefits, life/health insurance coverage, etc.). Fee is based on no. of employees/agency + one-time set-up charge. Contact Bill Quaine or Dave Zingo, 513-684-6764.
Commerce's COMMITTS (Ends 2004)	IDIQ	5-1%	Yes	1-3 weeks	Commerce Information Technology Solutions contracts awarded to 29 small, small disadvantaged and women-owned small businesses. Ceiling is \$1.5B. Solutions-based and performance-based contracts are in 3 business areas: Systems engineering, systems security, and systems operations and maintenance. See <a href="http://www.commits.doc.gov">http://www.commits.doc.gov</a> .
*Treasury's Project Support Svcs (Ends 9/2002)	FFP & BPAs	0%	No	3 days - 1 week	Contracts with Kelly Services, Westaff, National Systems & Research, etc. See <a href="http://www.fedsources.gov">http://www.fedsources.gov</a> . Administering office is Franchise Business Activity, reporting to Treasury's CFO. Services include clerical/administrative, IT, medical, technical/professional and industrial, to assist agencies in complying with GPRA, streamlining, downsizing, privatization, strategic sourcing, etc. Contact Karen Blum, 314-539-6015.
Air Force's Standard Systems Group (SSG)	IDIQ				SSG offers CMM Level III development capability. They are a franchise organization, offering services in the areas of program management; software development; acquisition of hardware; software and services; life cycle management support services for IT systems; and quality assurance testing for software. Contact Cheryle Cannaday at 334-416-3203, or <a href="mailto:cheryle.cannadv@gunter.af.mil">cheryle.cannadv@gunter.af.mil</a> . Web site is <a href="http://www.ssg.gunter.af.mil">http://www.ssg.gunter.af.mil</a>
DLA BPA Ends 2002	IDIQ	2%	Limited	1-2 weeks	NCI Information Systems provides IT products and services. DLA must issue orders, so 2% fee is mandatory. Contact Dick Frederick, 703/767-1212. See <a href="http://www.nciinc.com">http://www.nciinc.com</a>



\*Treasury's Franchise Business Activity programs that have multiple awards were done by geographic region. Therefore, within a particular region, there is no need to further compete your requirement.

QUESTIONS? Call Ronne Rogin, 202.622.0378. Email address is [Ronne.Rogin@do.treas.gov](mailto:Ronne.Rogin@do.treas.gov)  
Or you can go to <http://www.arnet.gov/gwac/govurls.html> or <http://policyworks.gov/intergov/> for another view of what's going on across the Government (GWACs/MACs not "findable" on the latter site)

For another listing of interagency contracts, check <http://ec.msfc.nasa.gov/hq/cci/adpmass.html> (arnet site has more current info than this one)



# **HEADQUARTERS POLICY FLASH**

**POLICY FLASH 2004-25**

DATE: October 1, 2004  
TO: Procurement Directors  
FROM: Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

SUBJECT: **Nepotism in Contracting**

SUMMARY: This Policy Flash forwards the attached memorandum reminding contracting personnel to avoid any conflict of interest that might arise when friends or

family members of DOE officials are contractor employees and to avoid even the appearance of favoritism or preferential treatment in the award of contracts. Questions may be addressed to Steve Zvolensky at (202) 287-1307 or [stephen.zvolensky@hq.doe.gov](mailto:stephen.zvolensky@hq.doe.gov).

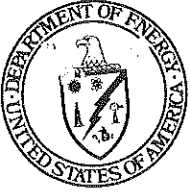
*Richard Langston* for

Michael P. Fischetti  
Acting Director  
Office of Procurement and  
Assistance Policy, OMBE

Attachment

cc:

PPAG Members  
Sandra Cannon  
Mark E. Decot  
Donald Lentzen



Department of Energy  
Washington, DC 20585

October 1, 2004

MEMORANDUM FOR DISTRIBUTION

FROM: RICHARD H. HOPF, DIRECTOR  
OFFICE OF PROCUREMENT  
AND ASSISTANCE MANAGEMENT

SUBJECT: Nepotism in Contracting

On August 6, 2004, I signed a memorandum regarding the *Proper Use of Other Agencies' Contracts*, issued under Procurement Policy Flash 2004-23. This follow-up memorandum addresses another area of concern in Government contracting known as nepotism. Nepotism involves showing favoritism by someone in power to relatives and friends. Earlier this year, the Government Services Administration (GSA) Inspector General began an investigation of contracts that were awarded to a company which employed relatives of a GSA acquisition official.

Sections 2635.502 and 2635.702 of Title 5, Code of Federal Regulations (CFR), prohibit Federal employees from taking official action in matters that are likely to have a direct and predictable effect on the financial interests of a member of the employee's household or a friend, if a reasonable person, with knowledge of the relevant facts, would question the employee's impartiality.

Section 2635.502 states, in part, "Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee..."

Section 2635.702 states, in part, "An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a non-Governmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations."

You are reminded to avoid any conflict of interest that might arise when friends or family members of the Department of Energy (DOE) officials are contractor employees and to avoid even the appearance of favoritism or preferential treatment in the award of



contracts. Acquisition personnel must be vigilant in contracting situations involving, or giving the appearance of, potential conflicts of interest. If you have any questions on this subject, please contact the Assistant General Counsel for General Law, GC-77, (or local ethics Counsel at field offices) which provides ethics advice on the standards of conduct for DOE employees.

## DISTRIBUTION

Mike Adams, Acting Procurement Director, Idaho Operations Office  
Michael Allison, Procurement Director, Savannah River Operations Office  
Mike Barrett, Acting Procurement Director, Office of River Protection  
John Bashista, Headquarters Procurement Services  
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Dale Siciliano, Procurement Director, National Environmental Technology Laboratory  
Mona Snyder, Procurement Director, Ohio Field Office  
Cris Van Horn, Procurement Director, Southwestern Power Administration  
Jerry Zimmer, Procurement Director, Golden Field Office

cc:

Bruce M. Carnes, Associate Deputy Director, DS  
Susan J. Grant, Director, ME-1  
James T. Campbell, Deputy Director, ME-2  
Stephen Mournighan, Deputy Director, ME-60  
Edward Simpson, Director, ME-62  
Jan Chavez-Wilczynski, Director, ME-65  
Robert, Braden, Director, NA-63  
James J. Cavanagh, Deputy Director, NA-63



# **HEADQUARTERS POLICY FLASH**

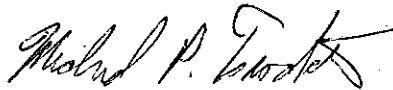
## **POLICY FLASH 2004-26**

DATE: September 17, 2004  
TO: Procurement Directors  
FROM: Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

SUBJECT: Discretionary Set-Aside Authority

SUMMARY: This Policy Flash forwards a memorandum signed by the Deputy of the Office of Procurement and Assistance Management for the Procurement Executive.

The purpose of this memorandum is to revise the discretionary set-aside authority addressed on Page 13 of Acquisition Letter 2004-03 from \$50,000 to \$100,000. Questions may be addressed to Steve Zvolensky at (202) 287-1307 or [Stephen.zvolensky@hq.doe.gov](mailto:Stephen.zvolensky@hq.doe.gov)



Michael P. Fischetti  
Acting Director  
Office of Procurement and  
Assistance Policy

Attachment

cc:  
PPAG Members





**Department of Energy**

Washington, DC 20585

**SEP 17 2004**

**MEMORANDUM FOR DISTRIBUTION**

**FROM:** 607 RICHARD H. HOPF, DIRECTOR  
OFFICE OF PROCUREMENT  
AND ASSISTANCE MANAGEMENT

**SUBJECT:** Discretionary Set-Aside Authority Proper

The purpose of this memorandum is to revise the discretionary set-aside authority addressed on Page 13 of Acquisition Letter 2004-03 from \$50,000 to \$100,000. The paragraph entitled, Discretionary Set-Asides, is revised to read:

"Contractors responsible for the management and operation of sites and facilities are authorized to set aside purchases at any dollar value for award to small businesses and to make purchases valued up to \$100,000 on a sole source basis to small businesses. If such programs are instituted, the contractor shall assure that awards are to be made at fair market prices."

If you have any questions on this subject, please contact Stephen Zvolensky of my staff at (202) 287-1307.



ME61-11

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